United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 20 1958
Joseph W. Stewart
CLERK

No. 14,089

938

LOUIS POLISNIK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

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219 [Filed in Open Court, April 3, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

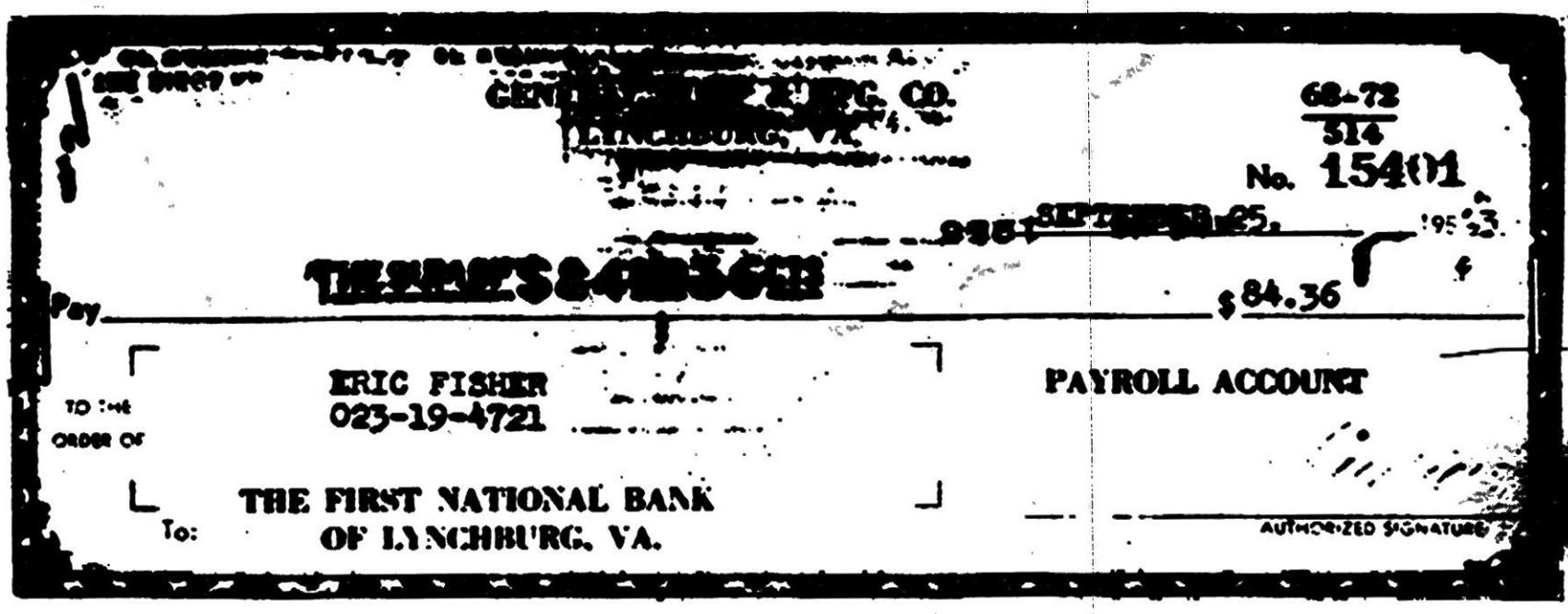
Holding a Criminal Term

Grand Jury Impanelled February 2, 1956, Sworn in on February 7, 1956.

The United States of America	:	Criminal No. 351 - '56
v.	:	Grand Jury No. 386-56
Louis Polisnik	:	Forgery and Uttering (22 D.C.C. 1401)

The Grand Jury charges:

On or about September 26, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, falsely made an forged in its entirety a bank check. Following is a photostatic copy of said falsely made and forged check:



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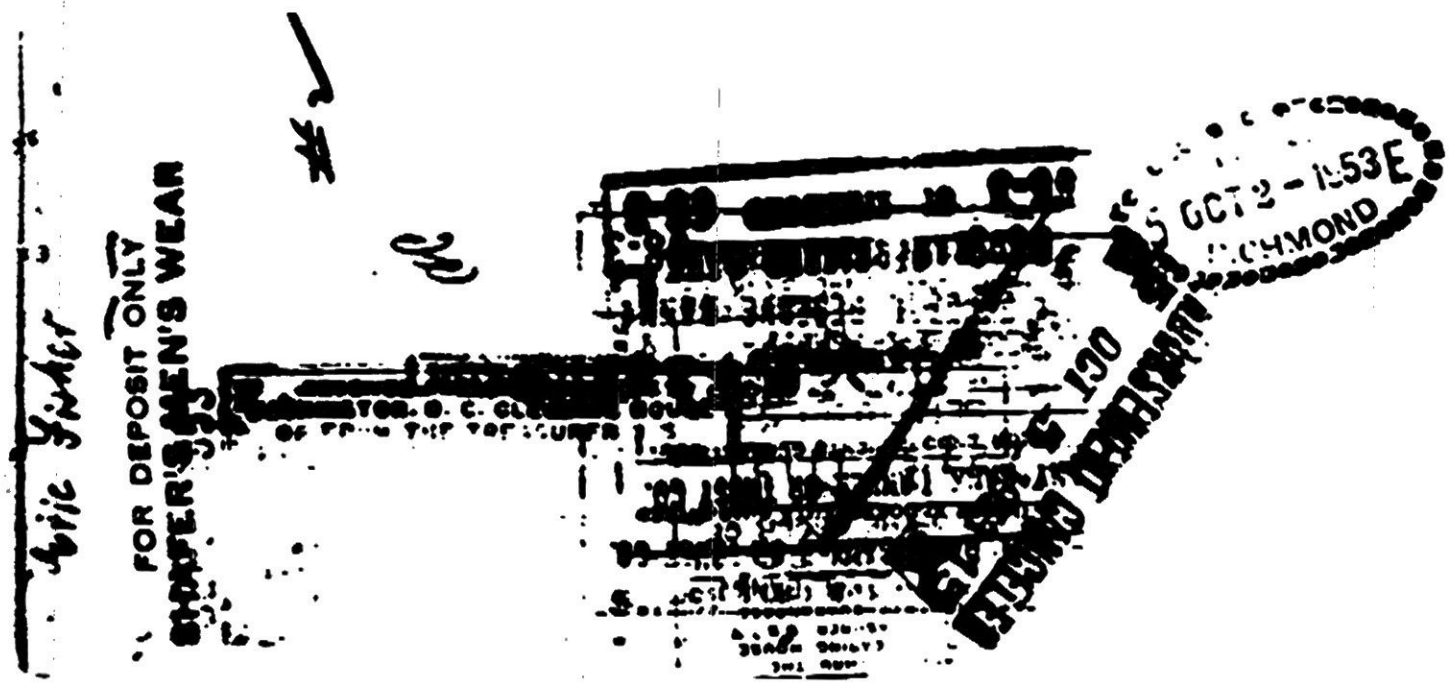


SECOND COUNT:

On or about September 26, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, passed and uttered to Sayre Shafer, as true and genuine, a forged bank check, a copy of which is set forth in the first count of this indictment and is incorporated herein by reference, well knowing the aforesaid check was forged.

220 THIRD COUNT:

On or about September 27, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, falsely made and forged in its entirety a bank check. Following is a photostatic copy of said falsely made and forged check:

GENERAL PUMP & MFG. CO.
LYNCHBURG, VA.

68-72
514

No. 15385

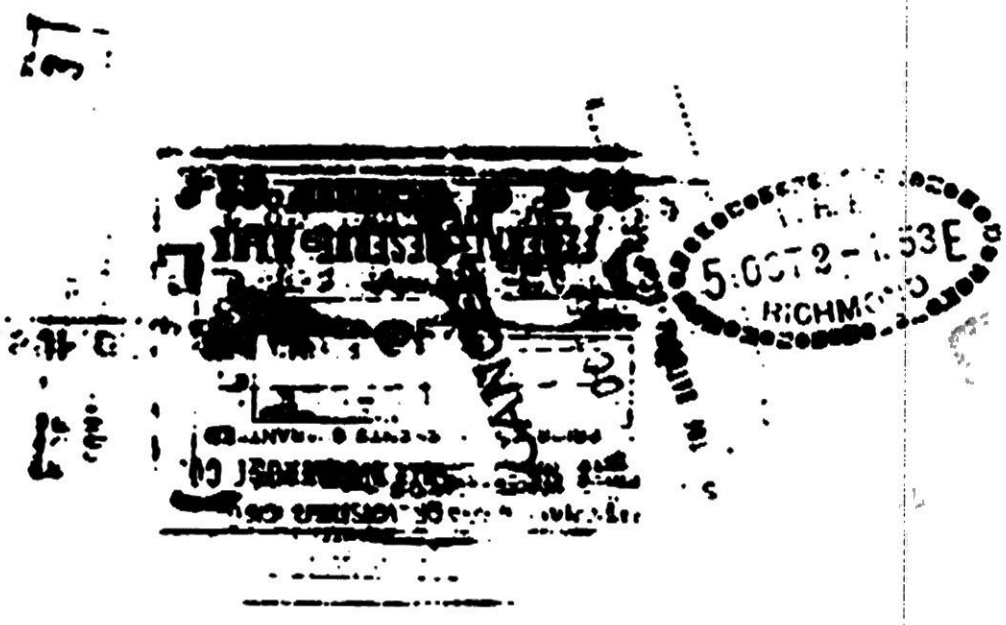
SEPTEMBER 27, 1953

Pay [redacted] $ 84.36

ERIC FISHER
023-19-4721

PAYROLL ACCOUNT

THE FIRST NATIONAL BANK
OF LYNCHBURG, VA.



FOURTH COUNT:

On or about September 27, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, passed and uttered to John J. Miles, Jr., as true and genuine, a forged bank check, a copy of which is set forth in the third count of this indictment and is incorporated herein by reference, well knowing the aforesaid check was forged.

FIFTH COUNT:

On or about November 28, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, falsely made and forged in its entirety a bank check. Following is a photostatic copy of said falsely made and forged check:

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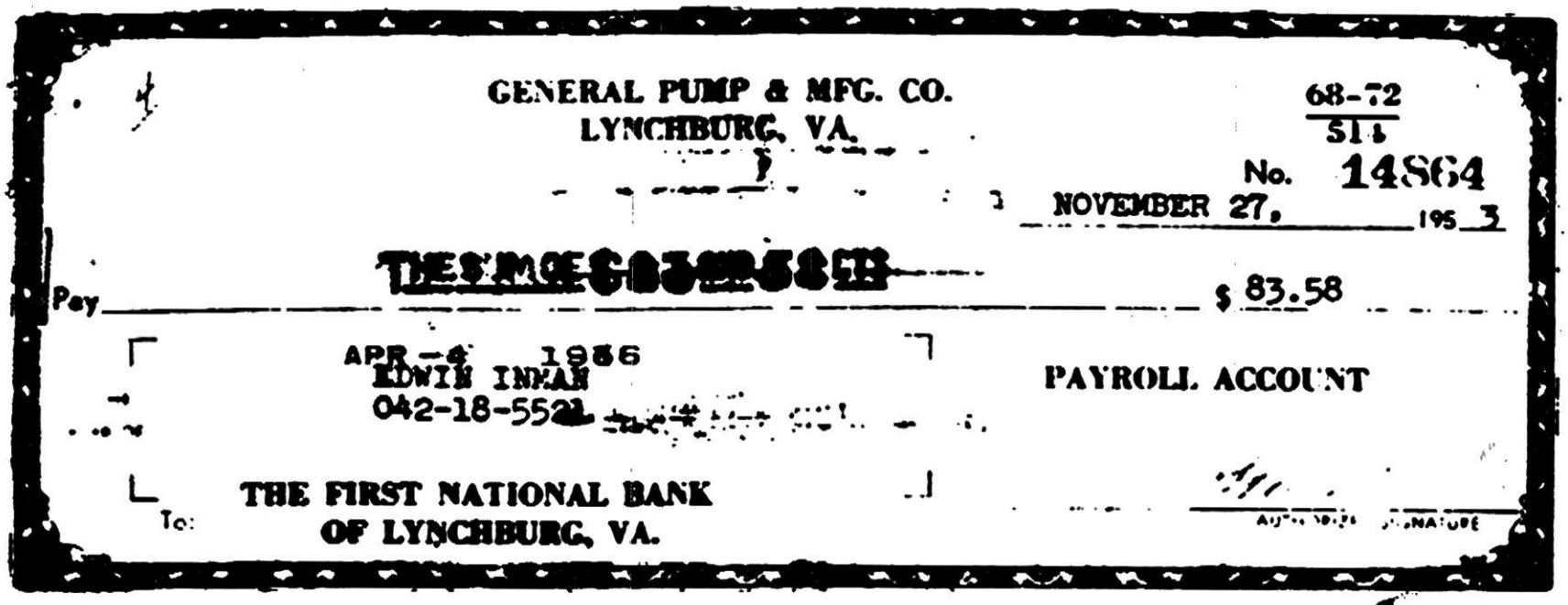


GENERAL PUMP & MFG. CO.
LYNCHBURG, VA.

68-72
514

No. 14864

NOVEMBER 27, 1953

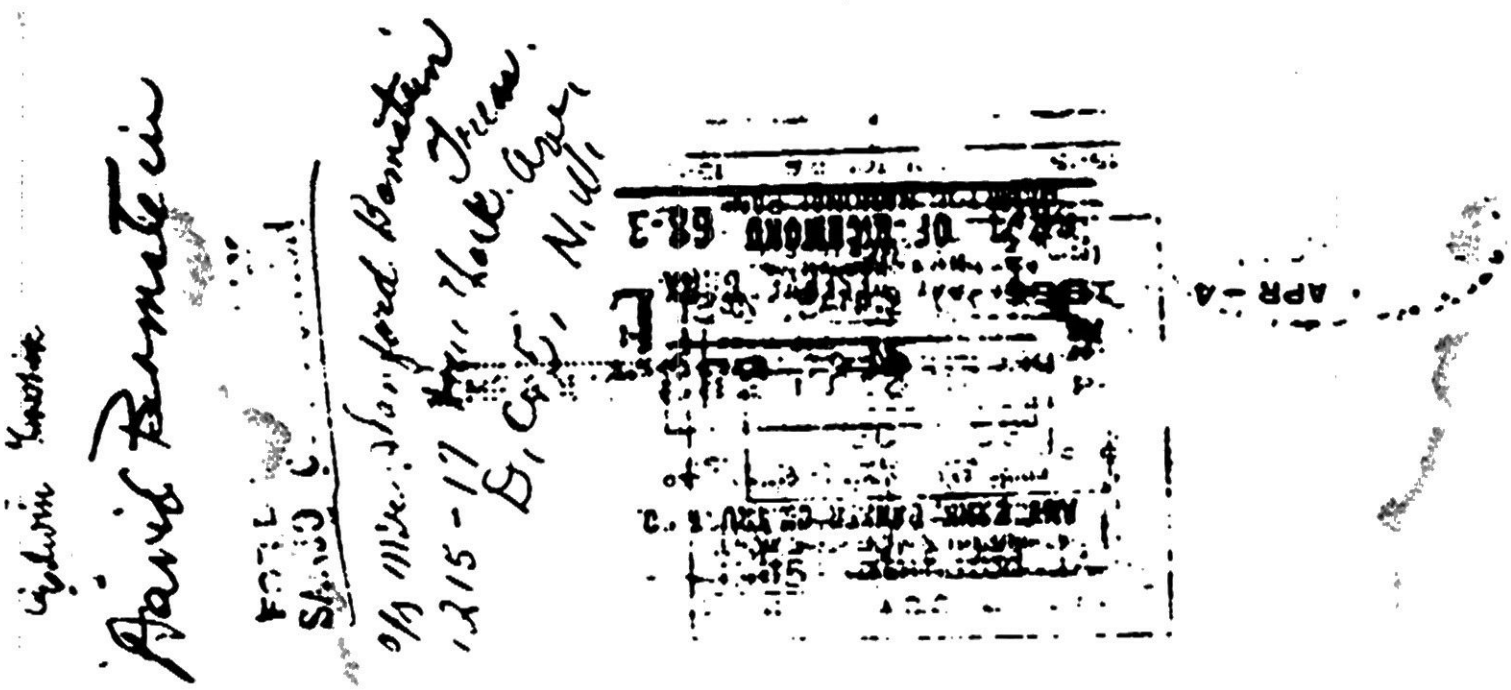
Pay [redacted] $ 83.58

APR -4 1956
EDWIN INMAN
042-18-5521

PAYROLL ACCOUNT

To: THE FIRST NATIONAL BANK
OF LYNCHBURG, VA.

AUTHORIZED SIGNATURE

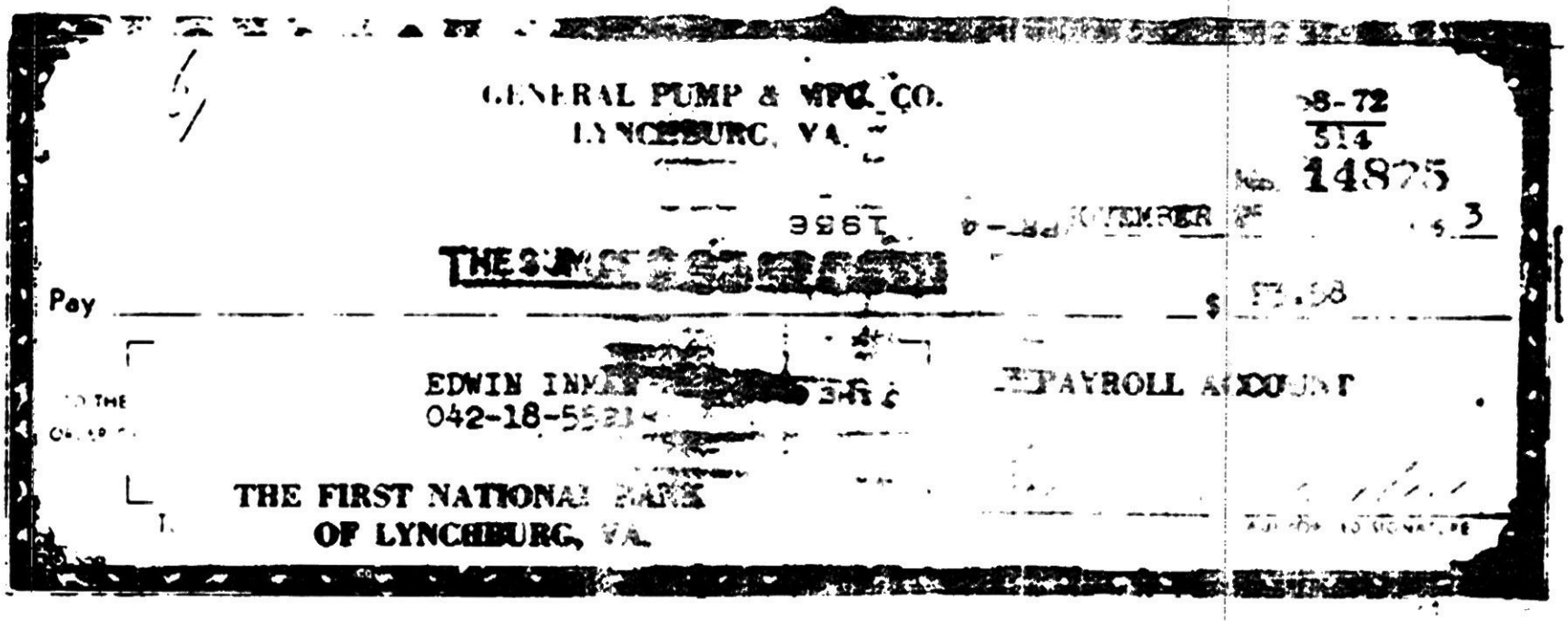


221 SIXTH COUNT:

On or about November 28, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, passed and uttered to David Bomstein, as true and genuine, a forged bank check, a copy of which is set forth in the fifth count of this indictment and is incorporated herein by reference, well knowing the aforesaid check was forged.

SEVENTH COUNT:

On or about November 28, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, falsely made and forged in its entirety a bank check. Following is a photostatic copy of said falsely made and forged check:


GENERAL PUMP & WPG. CO.
LYNCHBURG, VA.

8-72
514

No. 14825

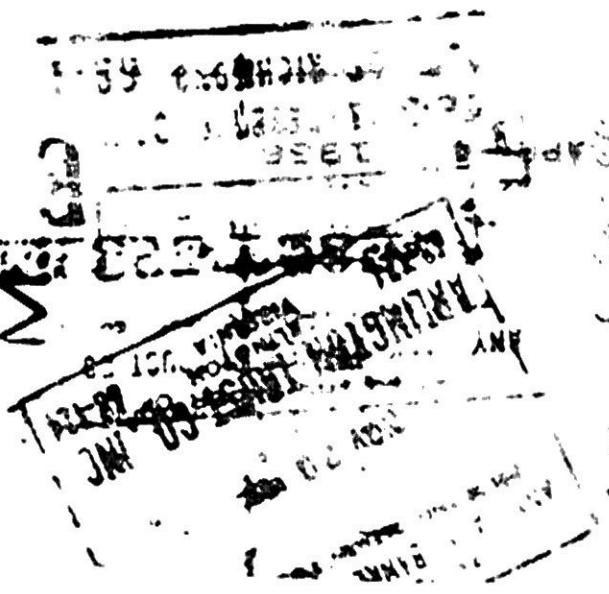
SEPTEMBER 3

Pay $ 53.58

EDWIN INM[illegible] PAYROLL ACCOUNT
042-18-55[illegible]

THE FIRST NATIONAL BANK
OF LYNCHBURG, VA.

For Deposit to the
Georgetown Bic,C.
Edwin T. Young, Owner



EIGHTH COUNT:

On or about November 28, 1953, within the District of Columbia, Louis Polisnik, with intent to defraud, passed and uttered to Julius H. Duehring, as true and genuine, a forged bank check, a copy of which is set forth in the seventh count of this indictment and is incorporated herein by reference, well knowing the aforesaid check was forged.

/s/ Leo A. Rover
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Charles E. Piggot
Foreman.

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222 PLEA OF DEFENDANT [Filed May 11, 1956]

On this 11th day of May, 1956, the defendant Louis Polisnik, appearing in proper person and requesting the Court to appoint counsel, which is so ordered, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is given a copy of the indictment. The defendant is remanded to the District of Columbia Jail.

By direction of

RICHMOND B. KEECH
Presiding Judge
Criminal Court # Three

Present:

United States Attorney

By Fred Smithson
Assistant United States Attorney

* * *

* * *

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223 [Filed May 22, 1956]

MOTION TO SUPPRESS

The defendant, by Court appointed counsel, moves the Court to suppress herein all writings and specimens of writing taken from the defendant and evidence therefrom while in the custody of officers, and representatives of the District of Columbia, Metropolitan Police Force, and for reasons therefor represents to the Court:

1. That on or about March 8, 1956, the defendant was taken into custody by Detective Carl Hayden of the District of Columbia Police in Union County, New Jersey, under a writ of detainer; that on the evening of said date, said officer did interrogate the defendant at length, and required the defendant to make certain handwritings; that said handwritings were taken from the defendant under duress, protest, and by coercion, and in violation of the legal rights of the defendant, and contrary to law.

[Certificate of Service]

/s/ Melvin M. Feldman
Attorney for Defendant

* * *

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224 [Filed June 8, 1956]

MOTION FOR APPOINTMENT OF PRIVATE PSYCHIATRIST TO ASSIST DEFENSE

Comes now the defendant, by Court appointed counsel, and moves the Court to appoint Dr. John R. Cavanaugh, psychiatrist, of 1703 Rhode Island Avenue, N.W., Washington, D. C., to assist the defense herein, payment for his services to be made by the United States, and for reasons therefor represents to the Court:

1. That the defendant gives the following mental medical history, to wit,

Bellevue Hospital, New York City, 1941.

Matteawan State Hospital, Beacon, New York, 1941-1944

Medical Center for Federal Prisoners
Springfield, Missouri, 1936-1939, 1954-1955

Judicial Determination of Mental Incompetency,
United States District Court, Eastern District of
Pennsylvania, under date of October 13, 1954.

Veterans Administration mental case history.

2. Court appointed counsel has verified institutional treatment at Matteawan State Hospital, and the Medical Center for Federal Prisoners. A certified copy of the judicial determination of mental incompetency has been requested from the U.S. District Court for the Eastern District of Pennsylvania, Medical information has been requested from the Veterans Administration. Medical reports from some of the institutions received note psychiatric condition at those times.

3. Among other defenses herein it is the contention of the defendant that at the times of the offenses with which he is charged in this cause, to wit, the period of September 1953, and November 1953, the defendant was in fact mentally incompetent at said times. It is therefore deemed necessary to the defense by Court appointed counsel, in order that full justice may be performed, that a psychiatrist be appointed to assist the defense herein, and to that end the movant requests that

225 Dr. John R. Cavanaugh, a disinterested reputable practicing private psychiatrist be appointed to so perform.

/s/ Melvin M. Feldman
Court Appointed Counsel for Defendant

* * *

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226 [Filed June 11, 1956]

On this 11th day of June, 1956, came the attorney for the United States; the defendant in proper person and by his attorney, Melvin M. Feldman, Esquire; whereupon, the defendant's motion to suppress evidence having been continued from Friday June 8th, 1956, is resumed; and thereupon, after argument by counsel, is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

Edward A. Tamm
Presiding Judge
Criminal Court # 4

Present:

United States Attorney

By V. Caputy
Assistant United States Attorney

* * * * * *

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228 [Filed October 5, 1956]

ORDER GRANTING LEAVE TO ISSUE FOREIGN SUBPOENAS IN FORMA PAUPERIS

Upon consideration of the motion of the defendant for leave to issue foreign subpoenas for non-resident witnesses at expense of the United States, and it appearing to the satisfaction of the Court that the same should be granted, it is by the Court this 5th day of October, 1956.

ORDERED:

That leave be and is hereby granted the defendant to issue in forma pauperis subpoenas for non-resident witnesses, the expenses therefore including witness fees and mileage to be paid by the United States from such funds as in such cases is provided by law, as follows:

(a) Dr. Samuel Leopold, Director Neuropsychiatric Division, Municipal Court of Philadelphia, Pennsylvania.

(b) Dr. John F. McNeill, Superintendent, or duly authorized officer, Matteawan State Hospital, Beacon, New York.

/s/ Alexander Holtzoff

[No Objection
/s/ Victor W. Caputy
Ass't. U. S. Attorney]

229 [Filed October 5, 1956]

On this 5th day of October 1956, came the attorney of the United States V. Caputy; the defendant Louis Polisnik not being present and by his attorney M. M. Feldman, Esq.; whereupon the motion for leave to issue foreign subpoenas in forma pauperis, coming on to be heard, after argument by counsel, is by the Court granted; whereupon the motion of defendant for appointment of private psychiatrist to assist defense coming on to be heard, after argument by counsel is by the Court denied.

By direction of

Alexander Holtzoff
Presiding Judge
Criminal Court # One

Present:

United States Attorney

By V. Caputy
Assistant United States Attorney

* * * * * *

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232 [Filed December 13, 1956]

JUDGMENT AND COMMITMENT

On this 7th day of December, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Melvin Feldman, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of FORGERY and UTTERING as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Sixteen (16) months to Four (4) years.

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It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge

The Court recommends commitment to: Medical Center at Springfield, Missouri.

* * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 [Filed September 19, 1957]

Washington, D. C.,
October 30, 1956.

The above-entitled matter came on for trial before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge, and a jury, at 10:00 o'clock a. m.

APPEARANCES:

On behalf of the Government:

VICTOR W. CAPUTI,
Assistant United States Attorney.

On behalf of the defendant:

MELVIN M. FELDMAN, ESQ.

* * * *

15 PHILIP G. WRIGHT

was called as a witness by the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTI:

Q. Please keep your voice up so that His Honor and the members of the jury can hear you.

Would you state your full name? A. Philip G. Wright.

Q. What is your position? A. Assistant cashier of the First National Trust and Savings Bank of Lynchburg, Virginia.

Q. What was the name of the bank in 1953, sir? A. First National Bank.

Q. And when was the name of the bank changed? A. In October, 1955.

Q. Pursuant to a subpena, sir, did you bring with you records of the bank to ascertain whether checks drawn in the account of the General Pump --

16 THE COURT: Ask one question at a time.

BY MR. CAPUTI:

Q. Did you bring a subpena, sir, with you? A. I did.

Q. And the records of the bank? A. I brought microfilm records of the bank.

THE COURT: What was your answer?

THE WITNESS: I brought microfilm records of the bank.

BY MR. CAPUTI:

Q. And are those records and microfilms kept in the official and regular business of the bank? A. Definitely; a permanent record of the bank.

MR. CAPUTI: May I have these marked as Government exhibits No, 1, 2, 3, and 4 for identification, if Your Honor please?

(Payroll checks drawn on the First National Bank of the General Pump and Manufacturing Company were marked Government's Exhibits 1, 2, 3 and 4 for identification.)

BY MR. CAPUTI:

Q. I show you, sir, what has been marked as Government's Exhibits 1, 2, 3, and 4 for identification and ask you, sir, what are they? A. These are apparently payroll checks drawn on the First National Bank of the General Pump and Manufacturing Company.

17 Q. Can you tell us whether those checks were received at the First National Bank of Lynchburg in 1953? A. They were.

THE COURT: Let me remind you to speak louder.

THE WITNESS: These checks were received by the First National Bank in 1953.

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BY MR. CAPUTI:

Q. When were they received? A. Shall I tell you each particular check?

Q. Each particular check. A. This check is Exhibit No. 4 and was received by the First National Bank on December 2-- may I look at my transcript?

THE COURT: Yes, indeed. You may consult any notes that you wish.

THE WITNESS: I cannot see this fine print on here.

This check was received by us on December 3, 1953 and was returned to the Federal Reserve Bank the same day.

BY MR. CAPUTI:

Q. Was that check honored, sir? A. It was dishonored.

Q. For what reason? A. No such account.

Q. Did you have at the bank an account in the name of the General Pump and Manufacturing Company? A. No, sir.

18 Q. Would you look at the next exhibit, sir? A. This is marked Exhibit No. 1, check No. 15401. This was received by us on October 1, 1953, and was returned by us on the same day to the Federal Reserve Bank. It, too, was dishonored.

Q. For what reason? A. No such account.

The check marked Exhibit No. 2, this check was received by us on October 1, 1953, and returned on the same date to the Federal Reserve Bank for the same reason, no such account. It was dishonored.

This check, No. 14875, was received by us on December 2, 1953, was returned dishonored by the Federal Reserve Bank on the same day.

Q. For what reason? A. I said it was dishonored for no such account.

MR. CAPUTI: That is all I have of this witness.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MR. FELDMAN:

Q. Mr. Wright, were you employed at the bank back in 1953?
A. Yes, I was.

Q. I presume, sir, when you are referring to your microfilms,
19 when you say the check was received that you are referring to the original? A. Yes.

Q. Do you have the original? A. I have the microfilms of these particular checks.

Q. These (indicating) are the original checks? A. Those are the original checks. Those have the return tags appended to each.

Q. Did the General Pump and Manufacturing Company -- was there ever such an account? A. Not to my knowledge.

Q. How far back did you make a check? A. Well, we made a check when these came in to determine whether or not we did have such an account. We did not have an account and we looked through all of the records and there was no such concern in Lynchburg.

Q. When you checked the account at that time, you checked the status of the current account, I presume? A. That is correct.

Q. In 1953. Did you also check the closed account? A. Yes, we always do that before we return a check.

MR. FELDMAN: Very well, no further questions.

MR. CAPUTI: May this witness be excused?

THE COURT: Any objection?

MR. FELDMAN: No.

* * *

21 MR. FELDMAN: The defense has subpenaed Dr. Leopold as to the defendant's mental competency and, naturally, he is excluded from the courtroom. I would like to have the Doctor be present and hear the testimony in the courtroom.

THE COURT: In other words, your request is to permit the Doctor to remain in the courtroom?

MR. FELDMAN: Yes.

THE COURT: I do not see any objection.

MR. CAPUTI: I have no objection.

THE COURT: Frankly, I have always felt that the rule

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excluding witnesses should not apply to expert witnesses, certainly not to psychiatrists.

You may have him in the courtroom if you wish.

(End of bench conference.)

THE COURT: You may proceed, Mr. Caputi.

MR. CAPUTI: Mr. Shafer.

Thereupon --

SAYRE SHAFER

was called as a witness by the Government and, being first duly sworn, was examined and testified as follows:

22 DIRECT EXAMINATION

BY MR. CAPUTI:

Q. Will you state your name, sir? A. Sayre Shafer.

Q. Can you talk a little louder?

THE COURT: What is your first name?

THE WITNESS: Sayre, S-a-y-r-e, Shafer.

BY MR. CAPUTI:

Q. What is your business or occupation, Mr. Shafer? A. I own and operate a men's wear store at 5614 Connecticut Avenue, Northwest.

THE COURT: What kind of a store?

THE WITNESS: Men's wear, men's clothing, furnishings.

THE COURT: What is the address again?

THE WITNESS: 5614 Connecticut Avenue, Northwest.

BY MR. CAPUTI:

Q. Were you the owner of that store in September of 1953? A. Yes, sir.

Q. I show you, sir, what has been marked as Government's Exhibit No. 1 for identification, which is a check, and I ask you if you can identify that check, sir? A. Yes, I can.

23 Q. How do you identify it, sir? A. This check --

THE COURT: Do not ask him how he identifies it. Ask him what it is.

BY MR. CAPUTI:

Q. What is Government's Exhibit No. 1? A. This is a check I received from the defendant in this case for merchandise and also for an amount in cash which I gave him the difference of. It was represented as a pay check of the defendant to me --

THE COURT: Just a moment. You have answered the question. Now, proceed.

BY MR. CAPUTI:

Q. When was the first time that you saw Government's Exhibit No. 1 for identification? A. For identification?

Q. When did you first see that instrument that you have in your hand? A. I first saw this on September 26 of '53.

Q. Who presented that to you, sir?

THE COURT: Have him tell the whole story. How did the check come to you?

THE WITNESS: Well, this gentleman over here (indicating), this gentleman represented himself to be a Mr. Fisher. He came in

24 my store as a stranger to me. He made several purchases and selections.

He spoke at that time that he was visiting a son in the neighborhood of my store and that his son was a customer of mine.

He selected several sport shirts and a topcoat and then he asked me if I would be able to cash his check which he had just received and he had certain identification. One specific thing I do recall was his social security card. The check was made out in the form of many pay checks. It had a retaining stub on the lower edge of the check which he tore off in my presence.

THE COURT: Keep your voice up.

THE WITNESS: He tore this lower stub off his check in my presence. There was no question in my mind that the check was a good check.

MR. FELDMAN: I object to what was in his mind.

THE COURT: Do not interrupt. You will have to wait until he finishes his answer and then you can move to strike.

THE WITNESS: I think that about covers it.

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THE COURT: Then what did you do?

THE WITNESS: Then what did I do? The check was endorsed by me and deposited by me.

THE COURT: I know, but what did you do at the time he handed you the check?

25 THE WITNESS: I accepted the check in payment. I accepted the check in payment for the merchandise and gave him the remainder in cash to make up the full amount of the check.

THE COURT: Proceed.

BY MR. CAPUTI:

Q. Did you see that person place the endorsement on that check? A. Yes, sir, I did.

Q. Was the endorsement placed thereon in your presence? A. In my presence.

Q. Do you see here in the courtroom the person who presented that check and who placed his endorsement on the back of that check? A. Yes, sir, I do.

Q. Point him out. A. The second gentleman at the table.

Q. Which one? A. The one right there (indicating) at the table, the older gentleman there.

Q. How is he dressed? A. He is dressed with, I would say, a blue gray topcoat, a plaid sport shirt, yellow with it looks like black.

MR. CAPUTI: May the record show the witness has pointed out the defendant?

26 THE COURT: The record may so show.

BY MR. CAPUTI:

Q. Was that check honored, sir? A. No, sir.

THE COURT: No, find out what this witness did with the check.

BY MR. CAPUTI:

Q. Did you deposit that, sir? A. Yes, sir, I deposited that check in our regular store account at Riggs National Bank and it was returned, I would say, within 6 to 8 days with no such account, I believe -- yes, no such account as the reason for it being returned from the bank it was drawn on.

Q. Dishonored, sir? A. Yes.

Q. How long would you say the defendant was in your presence at the store on that occasion? A. I would say he was in there 45 minutes. He was in no hurry. I was in no hurry. We talked about many things.

In general, he took his time in selecting the merchandise that he was interested in and he showed no signs of being in a hurry whatsoever and I was there most of the day that day and I was going no place, so I would say, fairly, he was in there 45 minutes.

Q. Subsequent to September 26, 1953, did you see that person,
27 the defendant, again after that? A. After that I identified the defendant at police headquarters just this year on March 9.

Q. To whom, sir? A. To Sergeant Hayden.

MR. CAPUTI: I would like at this time, if Your Honor please, to offer Government's Exhibit No. 1 for identification into evidence as Government's Exhibit No. 1 after having shown it to defendant's counsel.

THE COURT: Do you wish to bring out the details of the identification, whether it was a line-up or otherwise?

MR. CAPUTI: Yes, may I?

THE COURT: Yes.

BY MR. CAPUTI:

Q. Was that a line-up or just how did you identify this person at police headquarters? A. No, sir, it was not a line-up. He was seated in the office of Sergeant Hayden and Sergeant Hayden was there. There was also someone else in that room at that time.

Sergeant Hayden was on the phone at the time I came in and I immediately recognized this gentleman. He was sitting in a chair when I came in and I immediately recognized him when I walked in the room.

MR. CAPUTI: May I offer Government's Exhibit 1 for identification into evidence at this time.

28 THE COURT: Government's Exhibit 1 for identification may be admitted.

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(Government's Exhibit 1, previously marked for identification, was received in evidence.)

MR. CAPUTI: I have no further questions of this witness.

THE COURT: You may pass this to the jury if you wish.

(Government's Exhibit No. 1 was handed to the jury.)

THE COURT: You may proceed, Mr. Feldman.

CROSS EXAMINATION

BY MR. FELDMAN:

Q. Mr. Shafer, you testified that you received the check that has just been admitted in evidence on or about September 26, 1953? A. Yes, sir.

Q. You had not seen the defendant prior to that, had you, Mr. Shafer? A. Not to my knowledge, no, sir.

Q. The next time you saw the defendant was on about March 9, 1956? A. That is correct.

Q. That is approximately 2-1/2 years later. A. That is correct.

* * *

29 BY MR. FELDMAN:

Q. You stated in your testimony, as I recall, that he talked about a number of things. A. Yes, sir.

Q. What did he say? What did he talk about? A. General things in merchandise. He also said that he had traveled. He was a traveling man for this pump firm. He was on the road a good deal.

* * *

30 Q. When did you receive the call from Sergeant Hayden that he thought he had a suspect for you to dientify? A. I believe it was the day -- now, I am not sure whether I received that call on the day I identified him or on the day before, the evening before. I do know that he possibly got in touch with me that morning, the day I identified him.

Q. And in response to his request you went down to police

headquarters? A. That is correct.

Q. You went to the fraud squad, is that correct? A. Yes.

Q. Mr. Shafer, I think your last testimony was to the effect you went to the fraud squad on or about March 9, 1956 at the request of Sergeant Hayden?

31 THE COURT: Will you speak a little louder and repeat your question?

BY MR. FELDMAN:

Q. My recollection of the last testimony was to the effect that on or about March 9, 1956 you went to the fraud squad at the request of Sergeant Hayden to identify the defendant. A. That is correct.

Q. At that time was the defendant sitting or standing when you saw him at that time? A. The defendant was sitting when I walked into the room. I recognized him immediately after Sergeant Hayden was through with his telephone conversation and I verified that I recognized the defendant but would like to see him stand.

Sergeant Hayden asked him to stand. The man stood and turned around and sat back down again.

Q. Did the defendant say anything to you at that time? A. At that time, the defendant asked me, I believe in his very words he said, "You say you have seen me before," and I said "Yes." He said, "I have not seen you before," and I said, "Well, I am very sorry but I have seen you before."

* * *

32 JOHN JAMES MILES

was called as a witness by the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTI:

Q. Will you state your name, sir? A. John James Miles, Jr.

Q. What is your business or occupation? A. Manager of a Food Fair Supermarket.

* * *

33 Q. In September of 1953, what was your business or occupation?

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A. The same.

Q. Where were you employed then? A. 3528 East Capitol Street.

THE COURT: What was the number?

THE WITNESS: 3528 East Capitol Street.

BY MR. CAPUTI:

Q. Is that in the District of Columbia? A. Yes, sir.

Q. And in what capacity were you employed there? A. Manager.

Q. I show you what has been marked as Government's Exhibit No. 2 for identification. I ask you what is that, sir? A. That is the check that was tendered to me.

Q. When? A. September 29.

Q. By whom, sir? A. By a gentleman purporting to be Eric Fisher.

Q. Do you see that person here in the courtroom? A. I can't be exactly sure.

Q. Can you describe the person who presented that to you in September, 1953?

* * *

34 Q. Can you describe the person who presented that check to you in September of 1953? A. Yes, I remember him as a short, gray-haired gentleman.

Q. About how old? A. In his 60s.

Q. Under what circumstances did you receive Government's Exhibit No. 2 for identification?

THE COURT: No; ask a definite question. Nobody knows what you mean by "under what circumstances."

BY MR. CAPUTI:

Q. By whom was that presented to you, sir?

THE COURT: He has already said it was presented by this man who called himself Eric Fisher. If you want to ask him to tell the story, ask him to do that.

35 BY MR. CAPUTI:

Q. Tell us what happened concerning that check when you first saw it, sir. A. I was standing in the front of the store when a gentleman walked up to me and asked to have a check cashed. I asked him for identification and initialed the check at the time --

THE COURT: Just a moment. What happened then?

THE WITNESS: When I initialed the check, that is the authority for my cashier to cash it. The gentleman took it to the cashier and cashed the check.

THE COURT: Did you see that happen?

THE WITNESS: No, sir.

THE COURT: In other words, you have got him initialing the check. You have got to split the balance with some other witness.

MR. CAPUTI: Yes, Your Honor.

BY MR. CAPUTI:

Q. Can you tell us whether Government's Exhibit No. 2 for identification was deposited by you, sir? A. That would be the check --

Q. At the bank? A. Yes.

Q. And when? A. It would be on Monday, September 29.

36 Q. Was that check honored, sir? A. It was sent back to me, "No such account."

* * *

39 DAVID BOMSTEIN

was called as a witness by the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION - BY MR. CAPUTI:

* * *

Q. What was your business or occupation in November of 1953? A. Operator of a men's clothing store.

Q. Where was that? A. 1206 New York Avenue, Northwest.

Q. Were you the owner of that, sir? A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit No. 3 for identification. I ask you what is it, sir? A. This is a check that I cashed for a customer and it was no good.

Q. When did you cash it? A. November 28, 1953.

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40 Q. For what customer, sir? A. A man who called himself Edwin Inman.

Q. Do you see that person in the courtroom? A. Yes, sir.

Q. Would you point him out, please? A. The man right there (indicating) in the gray coat.

MR. CAPUTI: May the record show, if Your Honor please, that the witness has pointed out the defendant?

THE COURT: Yes, indeed, the record may so show.

Does this relate to the fifth and sixth counts?

MR. CAPUTI: Yes, Your Honor, the fifth and sixth counts.

BY MR. CAPUTI:

Q. What did you do with Government's Exhibit 3 for identification after you had received it from the defendant? A. I endorsed the check and deposited it in the bank.

Q. Was that check honored, sir? A. No, sir, it was returned to me, "No such account."

Q. Subsequent to November, 1953, did you see the defendant, the person who presented Government's Exhibit No. 3 for identification to you? Did you see him after that? A. No, sir.

Q. Anywhere? A. No, sir. One time I saw him in this court when he was in Sergeant Hayden's office I identified him as the man who passed the check that was worthless.

41 Q. Do you recall what date that was, sir? A. I believe it was in March, 1956.

* * *

Q. Who else was in the room at the time you saw this person, the defendant, in Sergeant Hayden's office? A. Sergeant Hayden.

42 Q. Anyone else? A. No, I don't think so.

Q. Where was the defendant at the time that you had seen him at Sergeant Hayden's office?

* * *

46 JULIUS H. DUEHRING

was called as a witness by the Government and, being first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION - BY MR. CAPUTI:

* * *

47 Q. What is your business or occupation, sir? A. I work in a bicycle shop for my son-in-law.

Q. Where is that, sir? A. 1611 Wisconsin Avenue.

Q. Washington? A. Georgetown, yes.

Q. Were you working there in November, 1953? A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit No. 4 for identification and I ask you, sir, what is that? A. That is a check that I cashed for a bicycle.

Q. Who gave that to you? A. The man right over there (indicating).

Q. Right over where? Would you point him out? A. With that striped shirt on right in the middle.

MR. CAPUTI: May the record show that the witness has pointed out the defendant?

THE COURT: The record may so show.

BY MR. CAPUTI:

48 Q. When did the defendant give you that? A. Right in the store, the Georgetown bicycle store.

Q. What date? A. In the morning. I forget the date. It has been three years ago.

Q. What did you do with Government's Exhibit No. 4 for identification after the defendant gave it to you? A. I handed it over to my son. I cashed the check and give him $33 difference with the bicycle he bought and he said that on the way home he would pick the bicycle up. He got $33 but he never came back for the bicycle.

Q. Can you tell us whether you deposited Government's Exhibit No. 4 for identification? Did you deposit it? A. It was deposited but I don't deposit them. My son-in-law deposits them.

Q. Can you tell us whether that check was paid after it was deposited? A. No. This here (indicating), it came back to the store.

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Q. As what, sir? A. "No funds."

Q. Was it dishonored?

* * *

49 Q. After November, 1953, did you see the defendant again? A. No, sir, I did not.

Q. Did there come a time that you saw him after that? A. I identified him when they brought him back, when I was called down here to identify him.

Q. What day was that? A. I don't remember that.

Q. What month? A. I don't remember that.

Q. To whom did you identify him? A. The man right there (indicating) in the middle.

Q. Did you identify him to any person? A. How is that?

Q. Did you identify him to any other person, to a police officer? A. Yes, I identified him.

Q. To whom? A. The policeman that sent for me to come down here, to pick him out.

50 Q. Where was that that you picked him out? A. I think it was right in this building, so far as I know.

Q. Do you know whether it was at police headquarters? A. No, I don't.

Q. At the time you picked out the defendant, was there any other person in there other than the defendant and the police officer? A. Just him, that was all.

Q. No one else? A. No.

* * *

CROSS EXAMINATION - BY MR. FELDMAN:

* * *

52 Q. You gave the police a description of the defendant back in 1953? A. Yes. I don't know whether it was the FBI man or policeman brought pictures around and I picked out the picture.

* * *

54 Q. When you were taken to the police office this year, you saw the defendant this year you have testified? A. Yes.

Q. Did you tell the officer who was present that this was the

man who gave you the check for the bicycle? A. Yes.

Q. Did you have any conversation with this man at that time? A. The police officer told me to go and look at him and I went in and looked at him and he turned around. He said, "If you want to say anything, say it." I just went out and I said, "I am still holding that bicycle for you if you still want it."

Q. Did he answer you? A. No.

Q. Did he say anything to the police officer? A. No, I didn't hear him say anything.

* * *

56 CARL L. HAYDEN

was called as a witness by the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION - By MR. CAPUTI:

Q. State your name and assignment, sir. A. Carl L. Hayden, Detective Sergeant assigned to the Check and Fraud Squad, Metropolitan Police Department.

Q. How long have you been a member of the Check and Fraud Squad of the Metropolitan Police Department?

* * *

57 THE WITNESS: This exhibit here, Government's Exhibit 2, was received from John J. Miles, Jr.

Exhibit 3 was received from Mr. Bomstein.

Exhibit 1 was received from Mr. Sayre Shafer.

No. 4 was received from Mr. Duehring.

BY MR. CAPUTI:

Q. When were they received, can you tell us? A. I couldn't tell you the exact dates. I would say within probably 10 days to 2 weeks from the time of the date appearing on said checks.

Q. Did you conduct an investigation then, sir? A. I did.

Q. As a result of the investigation, did you make an investigation of one Louis Polisnick? A. I did.

58 Q. Where was the arrest made and when? A. Elizabeth, New Jersey, on May 8, 1956.

THE COURT: Where did you say, Officer?

THE WITNESS: Elizabeth, New Jersey.

BY MR. CAPUTI:

Q. Did you then return to the District of Columbia? A. I did.

Q. On what date? A. On May 8.

Q. What time did you return to the District of Columbia?

A. I arrived in the District of Columbia around 6:00 or a few minutes after.

THE COURT: Afternoon or morning?

THE WITNESS: Afternoon.

BY MR. CAPUTI:

Q. You returned with the defendant, Louis Polisnick? A. I did.

MR. CAPUTI: May I have these marked as Government's Exhibits 5 and 6 for identification?

(Handwriting cards were marked Government's Exhibits 5 and 6 for identification.)

BY MR. CAPUTI:

Q. I show you, sir, what has been marked as Government's Exhibits 5 and 6 for identification and ask you, sir, what are they?

59 MR. FELDMAN: I object, Your Honor.

May we approach the bench at this time?

THE COURT: Are you objecting?

MR. FELDMAN: Yes.

THE COURT: Very well, you may come to the bench.

(At the bench:)

MR. FELDMAN: Your Honor, for the sake of the record, Government's Exhibits 5 and 6 are handwriting specimens taken from the defendant.

THE COURT: They have not been offered in evidence. Why are you here?

MR. FELDMAN: There was a motion to suppress. I object for the sake of the record.

THE COURT: Motion denied.

MR. FELDMAN: Motion denied?

THE COURT: The law is you do not have to renew the motion but you have renewed it. Objection overruled. You do not have to keep renewing the same objection.

(End of bench conference.)

THE COURT: You may proceed.

BY MR. CAPUTI:

Q. What are Government's Exhibits 5 and 6 for identification? A. They are what we refer to as handwriting cards.

60 Q. And whose handwriting is on those cards, sir? A. The majority of it is the defendant's. Certain portions was written by me.

Q. What portion of it was written by you, sir? A. Everything above this space (indicating) where it says "Writing space below." At the top is my signature and the word "Forgery" and what is written here "Louis Polisnick" on the typewriter, 7:40 p.m., Check Squad office is also put in by me.

Q. Is there anything on one or two sides of Government's Exhibits --

THE COURT: They speak for themselves.

Is there handwriting on both sides? You tell the Court. I am asking you whether the handwriting is on both sides or on one side.

MR. CAPUTI: They are on both sides.

THE COURT: Very well. They speak for themselves.

BY MR. CAPUTI:

Q. Whose handwriting is on that, sir? A. The defendant's, Louis Polisnick.

Q. When was that handwriting given, sir? A. It was given in the Check and Fraud Squad office of the Metropolitan Police Department on May 8, 1956 around 7:30 to 7:40. I have 7:40.

* * *

61 Q. Did you request of the defendant to give you samples of his handwriting, sir? A. I did.

Q. Did he?

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THE COURT: When?

BY MR. CAPUTI:

Q. When? A. Around 7:20 until 7:40. It was in the vicinity of 7:30, I will say, on May 8.

THE COURT: You mean the same day you brought him back from Elizabeth?

THE WITNESS: Correct.

* * *

62 Q. How long did that take, sir? A. Oh, 20, 25 minutes, I should say.

THE COURT: Bring out when this happened and what the conversation was.

BY MR. CAPUTI:

Q. At the time that you requested the defendant to give you specimens of his handwriting -- A. I did.

Q. Will you tell us what you said to him and what he said to you, sir? A. I told him that I was taking these specimens of handwriting for the purpose of sending them over to a handwriting expert for comparison with the checks that we had him charged with and he voluntarily gave me any writing I wanted and as much as I wanted.

THE COURT: Where did that take place?

THE WITNESS: In the Check and Fraud Squad department between 7:20 and 7:40.

THE COURT: Police headquarters?

63 THE WITNESS: That is right.

That was in the afternoon after we arrived back from Elizabeth, New Jersey.

BY MR. CAPUTI:

Q. Did you turn over to anyone Government's Exhibits 1, 2, 4, plus Government's Exhibits 5 and 6? A. I did.

Q. To whom did you turn them over? A. Ira Gullickson of the Metropolitan Police Department.

Q. Did he return them to you? A. He did.

MR. CAPUTI: I have no further questions.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MR. FELDMAN:

Q. Officer Hayden, you testified that you picked up the defendant on May 8, 1956. A. That is right.

Q. Do you wish to change that to March 8, 1956? A. I believe -- yes, March, that is right. It was March.

Q. Officer, did you call the complaining witnesses, Mr. Shafer and Mr. Bomstein --

THE COURT: Speak up, will you please, Mr. Feldman?

BY MR. FELDMAN:

Q. Did you contact the complaining witnesses after you apprehended the defendant, contact the witnesses Shafer, Miles, Bomstein and Duehring to come down to the Fraud Squad for identification? A. That is right.

64 Q. Did they do so?

THE COURT: I am going to exclude that. That is not proper cross examination because it is not within the scope of the direct examination.

* * *

66 Q. When the defendant was seen by the complaining witnesses at the Fraud Squad office, didn't he deny that he had seen them before?

THE COURT: Just a moment. That is outside of the scope of the direct examination. The only matters that this witness testified to on direct examination was the fact that he received these checks and he arrested the defendant and brought him here.

* * *

67 IRA N. GULLICKSON

was called as a witness by the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPUTI:

* * *

Q. What is your occupation? A. I am the examiner of

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questioned documents at the Metropolitan Police Headquarters.

* * *

68 Q. Showing you, sir, Government's Exhibits 1, 3, and 4 and Government 2 for identification and Government's Exhibits 5 and 6 for identification, I ask you if you have seen them before and under what circumstance, sir. A. Yes, I have. They were submitted to me by Officer Hayden of the Check and Fraud Squad of our department for examination.

* * *

69 A. *** it is my opinion that the signature "George J. Staunton," "George J. Stanton" and "John S. Guilford," appearing on the face of each of two checks, the endorsement "Eric Fisher" and "Edwin Inman," appearing on each of two checks, were all written by the writer of the standards which I examined at that time.

* * *

71 MR. CAPUTI: *** If I may, I would like to offer Government's Exhibits 5 and 6 into evidence.

THE COURT: I think you should.

MR. FELDMAN: Your Honor, you will note the objection on the same ground.

THE COURT: Yes; objection overruled.

(Government's Exhibits 5 and 6, previously marked for identification, were received in evidence.)

* * *

73 A. *** The signature, in looking at all four of the checks, the name of Guilford or Staunton as the authorizing signature, it is a very well written signature. It shows a great deal of pen control. It also shows throughout the writing a typical European training, especially in the formative years.

We have the variations of pen pressure that are quite marked. It is the form of writing that looks considerably like copy book writing; heavy down-stroke, very light and nice upstroke. That is consistent in all four of those signatures.

Comparing those signatures, of course, with the endorsements that appear on each of the checks, there is a great difference in general appearance and also comparing those signatures with the standard writings, there is a great difference in appearance. However, that

74 difference is found more in the size of the writing and in the different type of pen used.

We have an entirely different type of pen used between the signatures on the face and those used or that type of pen used in the endorsements and in the standards.

The writer has also altered the general size of the writing. Beyond that, there is no difference.

We find the characters in agreement. Testifying from memory, for example, in the name Guilford, the "F", which is a strictly European "F" and made in a manner that is characteristic of this writer on the standard, is also in each instance, seen in the name "Guilford" and I find that situation in the word "Eric." Eric Fisher, we find the use of the similar characters and similar formations all the way through. Therefore, the only actual discrepancy in any of the writing is that of size which, of course, we all know that anyone can alter the size of their writing.

Q. I follow you, Mr. Gullickson, when the signature of the makers appear to be copy book style in the sense that there is symmetry and beauty to the eye, but the signatures of the endorsements on the contrary appear to be not with the grace and ease of the makers.

Do you take the position that the signatures are the same type?

75 A. Yes, they are the same type, and in my opinion, the same writer.

Now, we must keep in mind -- I must keep in mind, of course, that the moment we change from a very flexible pen to one that there is no flexibility in it, for example, a ball point pen or a very stiff fountain pen, that we immediately lose that shading characteristic that is very pronounced in the signatures on the face of the check.

Q. With reference to and in particular, the "F" in the signature of "Guilford" and the signature in the endorsement of

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"Fisher," they are not similar to the eye, speaking as a layman. Would you agree with that? A. Offhand I couldn't say because I don't recall how it appears there. However, I do recall on the standard writing where the writer wrote the name "Eric Fisher" and the name of "John Guilford," we do find that "F" repeated again and consistently. I believe you will find it on the cards.

Q. I am referring in particular to Government's Exhibit No. 1, the comparison of the "F" in "Guilford" with the "F" in the endorsement in "Fisher." A. Well, of course, there should be a difference there. One is a capital and the other is a lower case letter. It is quite obvious they should be different.

* * *

76 Q. Would you agree that the endorsements are not written with the same symmetry as the signatures of the makers? A. I would say the endorsements are not written with the same care and carefulness. They do have the same characters and characteristics in them but not the same care.

Q. Is it your opinion that the difference between the endorsements and the makers is size? A. Yes, size and, in a couple of instances, change in slant.

For example, the "E" in Eric is slanted backhand and that is not normal in this person's writing as far as the "John S. Guilford" is concerned on the front of the check.

Q. To what do you attribute that? A. Well, I would attribute that to a certain amount of attempt to disguise the writing.

Q. How do you determine when someone is attempting to disguise writing and someone is writing naturally in that fashion?
A. Well, there are certain fundamental rules in regard to disguise. The first step is to change the slant. That is an elementary No. 1 rule. The second is to change the size of the writing and then, third, to try and change the appearance of the capital letters used. The average writer forgets that the important letters are often the small or lower

77 case letters and the connections between them that might --

they would overlook in trying to create a disguise.

* * *

80 MR. FELDMAN: A great deal of the testimony is in the record of the Veterans Administration. The defendant has a voluminous file and it is a case of going through the whole file.

THE COURT: Here is what we will do. Perhaps you and Mr. Caputi could sit down this afternoon and weed out what portions of the file you want to read into the record tomorrow. You do not want to read a whole file, a whole medical file out of which, most of which, no doubt, is immaterial, the man's temperature and things of that sort, so I think the thing to do is for the two of you to spend a half hour or more this afternoon, or whatever time is necessary, and mark the parts you want to read in evidence and then I suppose you will call the doctor.

MR. FELDMAN: I will call the doctor, yes.

THE COURT: Then within half an hour or so, you ought to finish your testimony?

MR. FELDMAN: Yes.

THE COURT: I do not think you ought to read the file because if you want to get any benefit out of the file, you would lose it if you

81 read every little detail of it.

MR. FELDMAN: I understand.

I have one other from Matteawan State Hospital. Mr. Caputi was not willing to stipulate, so I had to bring one of the custodians down.

THE COURT: I think you ought to stipulate to the formal proof.

MR. CAPUTI: All right.

* * *

* * *

86 MR. FELDMAN: I should like to offer a report from Dr. Orsinger, senior medical officer of District Jail, under date of May 24, 1956.

THE COURT: Show it to the other side.

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(The report was handed to government counsel.)

MR. CAPUTI: I object to this.

THE COURT: On what ground?

MR. CAPUTI: On the ground of relevancy, Your Honor.

87 THE COURT: The objection is on the ground it is irrelevant?

MR. CAPUTI: Yes, Your Honor.

THE COURT: Will counsel come to the bench and I will rule on this.

(At the bench:)

THE COURT: The issue in this case, so far as mental competency is concerned, is whether this defendant was mentally competent to commit this offense in the period from September to November, 1953. This report tends to show that in April of 1956 the defendant had a heart attack.

It is the opinion of the Court that that has no bearing upon the defendant's mental condition as of September, 1953, 2-1/2 years previous, so I will sustain the objection.

MR. FELDMAN: May I state this for the record?

THE COURT: No, you may not state anything after I have ruled.

MR. FELDMAN: I think there should be other factors brought to the attention of the Court.

The defendant has had, prior to 1953, Your Honor, as has been shown, a long history of cardiac condition for many years.

THE COURT: Then offer that at the end.

Objection sustained.

(End of bench conference.)

* * *

88 DONALD O'NEIL

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FELDMAN:

Q. What is your present occupation, Mr. O'Neil?

A. I am an employee of the Department of Corrections at Mattawan State Hospital, Beacon, New York.

Q. Are you here pursuant to a subpena to bring certain medical records of the hospital with you? A. Yes, sir.

Q. To whom do those records that you have with you pertain?

A. Louis Polisnick.

89 Q. What is the Mattawan State Hospital? A. That is a hospital for the criminal insane.

Q. That is in the State of New York? A. The State of New York.

Q. With reference to the records, can you tell the Court and the jury when Mr. Polisnick was admitted to the Mattawan State Hospital?

THE COURT: You are assuming he was admitted.

BY MR. FELDMAN:

Q. Was Louis Polisnick a patient at the Mattawan State Hospital? A. According to the information here, yes.

Q. Can you tell us when he was admitted to it? A. According to the information on this record, he was admitted February 16, 1942.

Q. When was he discharged, Mr. O'Neil? A. According to the record, he was discharged September 14, 1944.

Q. When he was admitted to Mattawan State Hospital in 1942, from what institution was he committed or transmitted?

* * *

91 THE WITNESS: Again, I have to refer to the records for that.

THE COURT: You may refer to any records that you need to.

The question was: Was he transferred from some other institution when he was admitted and, if so, from what institution?

THE WITNESS: He was admitted to the Mattawan State Hospital from Ryker's Island, Pennsylvania.

BY MR. FELDMAN:

Q. What was the diagnosis of Mattawan State Hospital pertaining to the defendant in 1942?

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MR. CAPUTI: I object to that, Your Honor.

THE COURT: Objection sustained.

MR. FELDMAN: Your Honor, may we approach the bench?

THE COURT: Yes, indeed.

(At the bench:)

THE COURT: How is that admissible?

92 MR. FELDMAN: Your Honor, the only way we can get in evidence of his mental condition and treatment while at Mattawan is by virtue of the diagnosis in the record. These records are kept in the original course of business.

THE COURT: Have you read the opinion regarding the admissibility of records kept in the regular course of business? Have you read the case of New York Life Insurance and Trust Company?

MR. FELDMAN: Yes, I have heard of that.

THE COURT: I am sure you have. Under that case and the cases that have followed it, hospital records are admitted for routine entries. They are also admitted for any physical facts that appear from observation -- that is a recent holding -- diagnosis is a matter of opinion and matters of opinion are not admissible.

What do you expect the answer to be?

MR. FELDMAN: Psychosis with psycopathic personality, Your Honor.

THE COURT: In view of the fact the objection has been made, I have to sustain it.

MR. FELDMAN: Psychosis with psycopathic personality.

THE COURT: I have to sustain the objection, I am sorry.

I construe the law to be, as applied by the decisions of the

93 Court of Appeals of this circuit, that matters of opinion other than purely physical are diagnoses. Objection sustained.

MR. FELDMAN: Your Honor --

THE COURT: No. I have ruled.

(End of bench conference.)

BY MR. FELDMAN:

Q. Mr. O'Neil, is there in the record that you have a report from Bellevue Hospital? A. There is in the record that he was examined at Bellevue and it is a report of the medical --

THE COURT: The question is whether he was examined at Bellevue Hospital and the answer is yes?

THE WITNESS: Yes.

THE COURT: When? Does that appear there also?

THE WITNESS: Yes, sir.

THE COURT: When?

THE WITNESS: October 23, 1941.

* * *

94 Q. Will you read us then the report of Bellevue Hospital from your records?

THE COURT: What is your question?

MR. FELDMAN: The report of Bellevue Hospital that is in the record, I would like to have that read.

THE COURT: What is your question?

MR. FELDMAN: Will you read the report?

MR. CAPUTI: I object, if Your Honor please.

THE COURT: Objection sustained.

* * *

95 Q. Do you have information in the file from Bellevue pertaining to the patient's examination in 1941? A. Yes.

Q. Will you read us that information?

MR. CAPUTI: I object.

THE COURT: Objection sustained.

MR. FELDMAN: May we approach the bench?

THE COURT: Yes, indeed.

(At the bench:)

MR. FELDMAN: Your Honor, in this file from Mattewan State Hospital, it is replete with psychotic tendencies.

THE COURT: I have ruled. I have told you what the law is or, anyway, how I construe it to be.

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I never hear counsel after I have ruled.

MR. FELDMAN: May I say one thing?

THE COURT: No, you may not. It is discourteous to the Court to continue arguing after the Court has ruled.

MR. FELDMAN: I appreciate that, Your Honor, but in all sincerity --

96 THE COURT: Go back to the counsel table.

(End of bench conference.)

BY MR. FELDMAN:

Q. When the defendant was in Mattawan State Hospital, was the clinical history made of him at that time? A. Yes, sir.

Q. Do you have that clinical history? A. Yes.

Q. Will you give us that clinical history?

MR. CAPUTI: I object to that.

THE COURT: Objection sustained.

I think the thing to do -- you are wasting an awful lot of time -- is to offer in evidence such portions of the record as you think are relevant and are admissible.

If there is no objection, the Court will admit it. If there is objection, the Court will then examine the portion of the record you are offering and rule on the objection.

MR. FELDMAN: Very well, Your Honor.

May we approach the bench, Your Honor?

THE COURT: Yes. We have to make faster progress.

(At the bench:)

MR. FELDMAN: Your Honor, I should like to offer in evidence from the medical records of Mattawan State Hospital the following documents:

97 1. A report under date of November 26, 1941, from Henry W. Rogers, Resident Psychiatrist, to Herman Baxt.

THE COURT: We do not have to have all those details. That report is dated when?

MR. FELDMAN: November 26, 1941.

THE COURT: Have you seen this?

MR. CAPUTI: No, I have not.

MR. FELDMAN: May I also go through the others?

THE COURT: I will pass on each one separately. I think we will make progress better.

Show the report to Mr. Caputi.

(The report was handed to counsel.)

THE COURT: Mr. Feldman, I directed you yesterday afternoon to go over this file with Mr. Caputi.

MR. FELDMAN: Your Honor, the District Attorney's file we did go over.

THE COURT: Why did you not go over this one?

MR. FELDMAN: That was not in issue, the VA report.

THE COURT: I do not know what you mean by "VA."

MR. FELDMAN: Veterans Administration.

THE COURT: I told you to go over all files with Mr. Caputi.

MR. FELDMAN: I am sorry.

THE COURT: You are wasting my time and you are wasting
98 the taxpayers' time. I am very angry at that.

MR. FELDMAN: Your Honor, it is a complicated medical history.

THE COURT: It is complicated. That is why I directed you to go over with Mr. Caputi all the files you wanted to offer in evidence. I did not say the Veterans Administration files. I said "files."

Hurry along.

MR. CAPUTI: I object to it, Your Honor, under the New York Life Insurance case and also Palmer v. Hoffman in our Court of Appeals.

THE COURT: Objection sustained.

MR. FELDMAN: Your Honor, I would like to offer in evidence the clinical summary at Mattawan State Hospital --

THE COURT: Identify it by date.

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MR. FELDMAN: April 13, 1942.

THE COURT: Very well. Show it to Mr. Caputi and see if there is any objection.

MR. CAPUTI: I object on the same grounds, if Your Honor please.

MR. FELDMAN: Your Honor, particular attention is called to the back of the first page. There is a mental history from Mattawan State Hospital.

THE COURT: Objection sustained.

MR. FELDMAN: There is also a diagnosis there.

99 THE COURT: I will sustain the objection.

I might explain the reason for the rule, as I understand the rule. The reason is that when it comes to diagnosis, it is a matter of opinion and the person making the diagnosis ought to be subject to cross examination. It is not a routine entry. The so-called Federal shop book rule applies to routine clerical entries.

MR. FELDMAN: I understand, Your Honor, but under the circumstances --

THE COURT: What is the next?

MR. FELDMAN: That under the circumstances, Your Honor --

THE COURT: Do not argue with the Court after the Court rules. The Court announces its ruling. It does not argue with counsel.

MR. FELDMAN: That is right.

From the notes of Mattawan State Hospital, a report under the denomination "Mental Status," dated February 16, 1942.

THE COURT: Let Mr. Caputi look at it.

(The report was handed to counsel.)

THE COURT: Mr. Feldman, my understanding is that you have a medical witness whom you are going to call, have you not?

MR. FELDMAN: Yes, Your Honor.

THE COURT: Then you have some medical testimony.

100 MR. CAPUTI: The same objection, if Your Honor please.

MR. FELDMAN: Just that portion I wanted to offer down to the transcript.

THE COURT: Mr. Caputi, I think this is somewhat different because this is a record of what the defendant said to the doctors.

MR. CAPUTI: Yes, Your Honor.

THE COURT: That does not contain any diagnosis or opinion on the part of doctors. Why is this objectionable?

MR. CAPUTI: I thought the latter part was objectionable. I objected to it on the grounds of the use of the words "paranoid trends" on the second page.

THE COURT: I did not catch that.

MR. CAPUTI: I think my eyes might have deceived me.

THE COURT: I am going to overrule the objection and admit the first page.

I will admit this document. There is a lot of it probably that you would not want to read.

MR. FELDMAN: That is true.

THE COURT: But you may read as much of it as you wish because it contains the defendant's statement to the doctors.

Anything else?

MR. FELDMAN: No, that is all from those records.

101 THE COURT: Very well. You may have this marked, if you wish, and then you may read the pertinent parts.

(End of bench conference.)

THE COURT: The Court will admit in evidence the report found in this file dated February 16, 1942 and counsel may read as much of it to the jury as he deems appropriate.

(Report dated Feb. 16, 1942, was marked Defendant's Exhibit 1 for identification and received in evidence.)

MR. FELDMAN: This is a report under date of February 16, 1942 made by Dr. Proctor of the Mattawan State Hospital at Beacon, New York --

THE COURT: No, do not describe it. Just read it.

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MR. FELDMAN: (Reading)

"Attitude and general behavior: Patient was quite orderly. Came willingly to the examining room, cooperated to the best of his ability for the mental examination.

"Mental activity: He answers questions in a relevant manner with no evidence of fright or retardation. Patient denied he was--".

THE COURT: None of us are getting anything that you are reading. It is just a waste of time to read it that way. Speak the way the Court is speaking and articulate every word.

102 MR. FELDMAN: (Reading)

"Emotional reaction, effect and mood: Patient denied that he was worried or depressed over his difficulties. He answered questions in a monotone without much expression of any kind.

"Mental trend and content of thought: Patient was born in Poland, November 19, 1891. The eldest child in a family of 3 brothers and 2 sisters. He went to school in Poland until he was 17 and then came to the United States in 1907. He stated he lived in Hoboken a few years, working as a salesman and then returned to Poland and served in the army a few years; came back to the United States in 1915. He resided in Boston, where he worked as a shoe salesman in 1917 when he enlisted in the United States Army. He served in Panama and then in the Army of Occupation in Germany.

"Following his discharge from the Regular Army in 1920, he enlisted in the Marine Corps for a few months but received a medical discharge.

"In 1922 he married a Jewish girl six years his junior but only lived with her a few years. She nagged him constantly and he left her. He has one daughter 19 years of age. He denied ever having contacted venereal disease.

"He was in several hospitals in Brooklyn because he

103 had high blood pressure. He has been arrested on a great number of occasions for robbery, larceny, et cetera. Admits he carried a revolver. Admits that he has been stealing but insists that he is just trying to get money which the American Express Company has stolen from him.

"He states that when he was in Germany in the Army of Occupation, he made $100,000 by manipulation of the foreign exchange. He deposited this money with the Express Company and they stole much of it from him. He states that all of his recent thefts have been in order to get some of this money back. He states while in the Marine Corps, he was supposed to be promoted but the American Express interfered and prevented it because they were jealous of him. He stated the company interfered and he has noticed its agents in many places and has had a feeling that they have been after him but is not sure of the reason but thinks they want to extort money from him.

"He has noticed people on the street looking at him in a peculiar manner. He states that this company has been making false accusations against him, saying he was crazy and have accused him repeatedly of stealing money.

"He claims in July, 1941, he stole $14,000 from an

104 express agent. He states that he knew this express agent, having seen him many years ago in Germany and also he says that this agent was spreading a story that the patient had murdered a man in New Hampshire. He is vague as to how he got the money from the express agent. Once he said he hypnotized him and just took it.

"He said the judge sent him to Ryker's Island to protect him from these agents. Again he says that while he was held in the Tombs awaiting trial he was twice sent to Bellevue Hospital. He states the doctors asked him all kinds of questions and tried to make out he was crazy; states that the

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doctors, especially Jewish doctors, were paid by the Express Company to persecute him. He states he was placed in the penitentiary and almost immediately was put in the hospital for examination. He states that many of the inmates were agents of the Express Company, that they spied on him and watched him and also made remarks about him and the money that he had taken.

"He asked the doctors to protect him from these men. He talks about a lot of underhand work which went on in the penitentiary against him but not able to give exact instances of persecution. He feels that the express company is persecuting his daughter. He states that his commitment to this hospital was absolutely illegal, that the Express Company
105 has prevailed on the judge and doctors to have him sent here.

"He denies that he has heard voices. He states that for a number of years he has had dizzy spells, ringing in his head. He thinks he has fainted and been unconscious but denies that he had a stroke. No other trend was elicited."

THE COURT: And the date of that is what?

MR. FELDMAN: February 16, 1942.

BY MR. FELDMAN:

Q. Once again, will you tell us when Mr. Polisnick was admitted to the Mattawan State Hospital and when he was discharged?

THE COURT: We have that. February 16, 1942 and discharged November 14, 1944.

Anything further with this witness?

MR. FELDMAN: Under the circumstances, no.

THE COURT: Do you have any questions?

MR. CAPUTI: No questions, Your Honor.

MR. FELDMAN: May the witness be excused?

THE COURT: The witness may be excused.

(Witness excused.)

THE COURT: Before the witness takes these records back, do counsel wish the records to remain in the custody of the Clerk?

* * *

106 JAMES M. BISHOP

was called as a witness by the defendant and, after having been first duly sworn, was examined and testified as follows:

* DIRECT EXAMINATION - BY MR. FELDMAN: *

107 Q. Mr. Bishop, are you here pursuant to a subpena to bring certain records with you? A. Yes, sir.

Q. Do you have certain records with you at this time?

A. Yes, sir.

Q. What subject do those records pertain to? A. They are the official VA files of one --

THE COURT: When you say "VA," you mean Veterans Administration, is that so?

THE WITNESS: Yes.

THE COURT: We do not use abbreviations.

THE WITNESS: I am sorry.

Veterans Administration C file of Louis Polisnick and his C number is 618987.

THE COURT: What is a C file?

THE WITNESS: That is the veteran's official records with the Veterans Administration. That is the central file of his record.

THE COURT: Does the letter "C" have any significance?

THE WITNESS: Originally, I think it meant "Compensation file."

BY MR. FELDMAN:

Q. Mr. Bishop, referring to March 6, 1933, do you have a record in your file pertaining to an examination of the defendant on or about that time? A. The date, sir?

108 Q. March 6, 1933.

THE COURT: Mr. Feldman, I understood you to say at the bench conference that you and Mr. Caputi had been over the file.

MR. FELDMAN: Yes, Mr. Caputi will confirm this to be so, Your Honor.

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THE COURT: Very well. I am not questioning it. If that is so, then you ought to know what you want to offer.

Go ahead and offer the part of the file you want to offer in evidence. That will abbreviate matters.

MR. FELDMAN: Very well. The record under date of March 6, 1933, I offer in evidence.

THE COURT: If the witness has no objection, let him turn over to you now, physically, this file and you offer those portions of this file that you wish to offer in evidence. I think that will save time.

You have got a list of the portions of the file that you want to offer?

MR. FELDMAN: Yes.

THE COURT: Very well.

Have you any objection?

THE WITNESS: Yes, I have, if I may state it for the record.

I am merely custodian of the record and our regulations state
109 they are not to be out of our possession. If the Court will give me permission, I will be glad to do so.

THE COURT: If the Court directs the records to be impounded, they will be impounded because you are a member of the Bar and you understand that the Court's directions supersede any intramural regulations. However, suppose you produce the particular document that Mr. Feldman has asked for.

THE WITNESS: The file is marked -- I am sorry I am slow -- I can't find that particular examination.

Did you say an examination or rating?

BY MR. FELDMAN:

Q. I believe it was rating. A. I see a rating here of 12-6-33 based upon a physical examination.

THE COURT: Will you repeat your request?

MR. FELDMAN: My request was pertaining to a report.

THE COURT: What are you asking the witness to produce?

MR. FELDMAN: A document under date of March 6, 1933, pertaining to an examination.

THE COURT: What is the title of the document?

MR. FELDMAN: It is simply a medical report.

THE COURT: Is there a title to it?

MR. FELDMAN: Not that I recall.

THE WITNESS: I have a report here. It is marked 16-33, and
110 it has February 11, 1933 date on it, and I think that is about the time that they have in mind there.

BY MR. FELDMAN:

Q. Was that marked by Mr. McQuade, do you know? A. The examination itself is not marked, no, sir.

MR. FELDMAN: May I see that?

THE COURT: Have you produced the paper?

THE WITNESS: I cannot find it, sir, without going through the records.

MR. CAPUTI: May I address the Court?

THE COURT: Yes, indeed.

MR. CAPUTI: I have made a notation of all the records that we went through and I do not think the representative of the Veterans Administration was asked about March 6, 1933. I have a notation of 12-6-33 that he was asked about.

THE WITNESS: I have that.

MR. FELDMAN: Your Honor, I would like to introduce --

THE COURT: This report, sir, is what?

THE WITNESS: This is a rating sheet made by the rating board of the Veterans Administration based upon the evidence in the file somewhere, examination or evidence in the file.

MR. FELDMAN: I would like to offer that rating sheet in evidence, Your Honor.

THE COURT: Show it to Mr. Caputi.
111 Have you seen it, Mr. Caputi?

MR. CAPUTI: I haven't seen the contents of it.

THE COURT: Then you should see it. You have a right to

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see it.

(The report was handed to counsel.)

MR. CAPUTI: I object to it, Your Honor.

THE COURT: Let me see it.

(The report was handed to the Court.)

THE COURT: Mr. Feldman, I presume what you really want is the next to the last paragraph?

MR. FELDMAN: I believe so.

THE COURT: I am going to sustain the objection for the reason stated in excluding some of the other records.

BY MR. FELDMAN:

Q. Mr. Bishop, will you find in your records a report under date of November 17, 1936, from Springfield Mental Hospital in Springfield, Missouri? A. Yes, sir. I find a copy of a progress report.

MR. FELDMAN: I would like to offer this report in evidence, Your Honor.

THE COURT: Have you seen it?

MR. CAPUTI: No.

THE COURT: You have a right to see it before the Court rules on it.

I thought you gentlemen went over all those matters yesterday
112 afternoon.

MR. FELDMAN: We did, in summary.

MR. CAPUTI: He just gave us the captions.

THE COURT: You didn't go over the documents themselves?

MR. CAPUTI: No.

THE COURT: Why not?

MR. FELDMAN: I had received certain preliminary information --

THE COURT: No. I asked you both, when we recessed yesterday, to go over the file together and pick out what you were going to introduce and let Mr. Caputi read what you were going to

introduce so he would be ready, either to object or consent. Why wasn't that done?

MR. FELDMAN: I have picked out what I want to introduce.

MR. CAPUTI: I object. I know what it is. I object to it for the same reason.

THE COURT: Very well, Let me see it.

(The report was handed to the Court.)

THE COURT: I think your objection, Mr. Caputi, is not applicable to this report. It contains no diagnosis. It is just a report of physical examination.

Of course, this is not a record kept by the Veterans Administration and so that, if you wanted to make a technical objection, it is

113 not a record kept in due course of business by the Veterans Administration. It is a record that was received by the Veterans Administration. I do not suppose you want to stand on that, however, do you?

MR. CAPUTI: No, Your Honor.

THE COURT: I do not see any objection to this.

MR. CAPUTI: May we approach the bench on it, Your Honor?

THE COURT: Yes, indeed.

(At the bench:)

THE COURT: All this is is a physical examination. As a matter of fact, I do not know why Mr. Feldman wants it.

MR. CAPUTI: When Mr. Feldman was in my office yesterday, he said that that report indicated that there was schizophrenia, paranoiad type.

THE COURT: What is that?

MR. CAPUTI: The Veterans Administration report 11-17-36, which indicated he was a schizophrenia, paranoiad type, improved.

THE COURT: I do not see that there at all.

MR. CAPUTI: Your Honor, it is my understanding --

THE COURT: Yes, that is on the third and fourth page.

MR. FELDMAN: That there was a diagnosis.

THE COURT: Yes. I am going to exclude that. I am perfectly willing to admit the first 2 pages but I do not suppose that would be of any consequence to you, Mr. Feldman, and I will exclude the third and fourth pages.

114

(End of bench conference.)

THE COURT: I will sustain your objection, Mr. Caputi, to the third and fourth pages.

MR. FELDMAN: Will Your Honor indulge me while I look over the first and second pages?

THE COURT: Surely.

MR. FELDMAN: Mr. Caputi, may we approach the bench?

THE COURT: Just a moment.

MR. FELDMAN: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. FELDMAN: In all fairness, Your Honor, there is a diagnosis on page 2 pertaining to hypertension.

THE COURT: I have no objection to your putting that in because that is a physical diagnosis that can be made by instruments.

MR. CAPUTI: Yes, Your Honor.

(End of bench conference.)

THE COURT: The Court will admit the first 2 pages and you may read any part of those 2 pages that you wish. I do not suppose you want to read them all because a great many of them are routine entries.

115

MR. FELDMAN: Yes, Your Honor.

This is under date of November 17, 1936. (Reading) "Scalp: Hair gray. "Diagnosis: Hypertension; arterial hemorrhoids external.

"Absence: Second toe, right foot."

THE COURT: Why do you not use the lectern? That is what it is intended for and then you won't have so much difficulty.

MR. FELDMAN: "Medical treatment for hypertension" -- that is all.

THE COURT: Very well.

BY MR. FELDMAN:

Q. Mr. Bishop, do you have a report in the file, a progress report from Springfield under date of April 14, 1938? A. Yes, sir.

MR. FELDMAN: I would like to offer this report in evidence.

MR. CAPUTI: I object to it on the same ground.

THE COURT: Let me see it.

(The report was handed the Court.)

THE COURT: That is a letter of April 14, 1938?

MR. FELDMAN: Yes.

116 THE COURT: You may come to the bench.

(At the bench:)

THE COURT: Is this (indicating) what you are offering?

MR. FELDMAN: Yes, Your Honor. It does make reference to a previous report showing no progress.

THE COURT: Objection sustained because it expresses an opinion as to a mental state. Moreover, this is not a record of the Veterans Administration from whose files it is produced. Therefore, the shop book rule does not apply. I will exclude this on both grounds.

MR. FELDMAN: Your Honor, the Veterans Administration makes determinations based, in part, upon information they have.

THE COURT: Just a moment. I understand all that.

(End of bench conference.)

BY MR. FELDMAN:

Q. Do you have in the files, sir, a report from Springfield, Missouri, under date of March 15, 1938?

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THE COURT: What date?

MR. FELDMAN: March 15.

THE COURT: Of what year?

MR. FELDMAN: 1938.

THE WITNESS: Sir, it is not marked and I cannot tell unless I go all the way through the file. I mean it is not earmarked here.

117 BY MR. FELDMAN:

Q. Do you have a report in your file under date of April 13, 1942, from Mattawan State Hospital?

THE COURT: Is this a report from another institution?

MR. FELDMAN: Yes, Your Honor.

THE COURT: That would not be admissible, you know.

MR. FELDMAN: Your Honor, it is part of the Veterans Administration file.

THE COURT: Reports that a person receives from others are not records kept by him in the regular course of business unless it is his employee or a member of his own staff. However, if you wish to make a record, you may tender it.

BY MR. FELDMAN:

Q. Do you have that report, sir? A. What is the date, sir?

Q. Under date of April 13, 1942. A. I find nothing under that date.

Q. I am sorry, I didn't hear that. A. I find nothing under the date of April 13, 1942, -- just a moment, I am sorry. Maybe I am wrong on that -- no, sir, I don't see anything for April 13.

Q. Do you have a report from Mattawan State Hospital in the file? A. Yes, sir.

118 Q. Under what date is that? A. A letter of transmittal is dated April 14, 1942. I don't know the date of the report.

MR. FELDMAN: I should like to offer that letter in evidence.

MR. CAPUTI: I object to it, Your Honor.

THE COURT: I will have to see it before I will rule on your objection.

(Letter dated April 14, 1942 was handed the Court.)

BY MR. FELDMAN:

Q. Do you have a letter --

THE COURT: Just a moment. I have not ruled on the objection yet.

This contains a great many opinions and I am going to sustain the objection and also because it is not a record of the Veterans Administration from whose file it is produced.

I will sustain the objection on both grounds.

BY MR. FELDMAN:

Q. Mr. Bishop, in the correspondence of the Veterans Administration, what is the information obtained from other institutions used for? A. I don't believe I am in a position to answer that question, sir.

THE COURT: Even assuming it is, that does not make it admissible under the Federal shop book rule. That makes admissible records
119 kept in due course of business and that means, of course, records of the organization from whose files the records are produced and not somebody else's records that happen to be in his files.

We will take our mid-morning recess at this time.

(A short recess.)

THE COURT: You may proceed, Mr. Feldman.

BY MR. FELDMAN:

Q. Mr. Bishop, do you have in your files a record between January 26, 1946 and 1947 of the Veterans Administration Hospital in the Bronx, New York? A. Would you mind repeating those dates, sir? A. The period November 21, 1946 through January 2, 1947, the Veterans Administration Hospital, Bronx, New York. A. Yes, I have a summary here of the hospitalization. The three things go together.

MR. FELDMAN: I would like to ask that they be admitted in evidence, Your Honor.

MR. CAPUTI: I object to part of the report for the

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reason stated.

THE COURT: Let me see it, then.

(The reports were handed to the Court.)

THE COURT: You say you object to part of it?

MR. CAPUTI: Yes.

120 THE COURT: Suppose you gentlemen come to the bench and Mr. Caputi may indicate what part he objects to.

(At the bench:)

MR. CAPUTI: I object to the part, Your Honor, that indicates he was a psychopathic personality with a paranoiad type.

THE COURT: I am going to sustain that objection. Is there a statement to that effect?

MR. CAPUTI: So they informed us yesterday. That is a notation I have, Your Honor.

THE COURT: I am going to sustain the objection to that part of the report. I do not suppose you are interested in any other part.

MR. FELDMAN: Yes, Your Honor, I will read all of the diagnosis except that one, then, Your Honor.

THE COURT: That is the item of the diagnosis that you are objecting to?

MR. CAPUTI: Yes.

THE COURT: Have you read this (indicating)?

MR. CAPUTI: No. You see, Your Honor, I made a brief summary of what he said it contained.

THE COURT: Yes, I know, but I want to know specifically what you object to. Have you read this over?

MR. CAPUTI: I object to any part of it.

THE COURT: You cannot do that. You have got to indicate,

121 physically, what part you object to.

MR. CAPUTI: I have no objection to the medical part.

THE COURT: I know, but I have to know whether you are objecting to line 1, line 10, line 20, and so on.

MR. CAPUTI: I would like to look at it.

THE COURT: Have you not looked at it?

MR. CAPUTI: I have a notation of what he said he was going to offer.

THE COURT: I have to make a definite ruling.

MR. CAPUTI: I stand on that, Your Honor. I object to the part that contains the reference --

THE COURT: No, you tell me what line and what page.

MR. FELDMAN: Your Honor, may I say, in all good faith, the file is voluminous. We spent an hour and a half going over this.

THE COURT: Just a moment.

MR. FELDMAN: Yes, Your Honor.

THE COURT: You are moving too slowly, Mr. Feldman.

MR. FELDMAN: I understand but the medical report is voluminous.

THE COURT: But all of this should have been digested before.

MR. FELDMAN: It is not Mr. Caputi's fault.

MR. CAPUTI: I object to the references here

122 (indicating), Your Honor.

THE COURT: That does not mean anything. State line so and so, page so and so.

MR. CAPUTI: Starting, Your Honor -- I don't know what page it is. There is no reference.

THE COURT: Well, it is the last page.

MR. CAPUTI: Yes.

THE COURT: What line?

MR. CAPUTI: The sixth line from the bottom which says that he was also seen by the psychiatrist who felt that he was a psychopathic personality.

THE COURT: Objection sustained.

MR. CAPUTI: Then there is a reference in the last item --

THE COURT: Item 9?

MR. CAPUTI: Yes.

THE COURT: Objection sustained.

If there is any other part that you wish to read, you may do so. The balance is admitted. I suppose there is a lot of material probably that is of no value but you may read so much of it that I have not excluded, as you see fit, Mr. Feldman.

(End of bench conference.)

MR. FELDMAN: Ladies and gentlemen of the jury, I am reading a report under date of January 2, 1947:

123 "Final summary: Patient is a 55-year-old white male who entered this hospital on 21 November 1946, because of pain in his right shoulder of five weeks duration. This pain started five weeks ago without previous trauma. Pain is aggravated by lifting heavy weights and by certain locations. Patient cannot accurately describe the type or character of the discomfort.

"In addition, he has been told he has high blood pressure since 1927. At that time, he had headaches, dizziness and shortness of breath. He was surveyed at that time and given 100 percent disability.

"He also noticed he would have pain in his legs on walking. He also had episodes of blurring of vision but he never blacked out. He also recently has had episodes of dizziness, headaches, nocturnal enuresis. He has had occasional episodes of residual angina.

"Past history includes flu in 1920 with complicating pneumonia, malaria. Patient has been up for criminal charges on many occasions for passing bad checks. Confined in jail in Illinois.

"He also gives history of being confined to various institutions scattered throughout the country. At one time he was confined to a mental institution for 32 months.

124 "X-rays showed an enlarged heart, probably hyper-

tensive X-ray of the right shoulder revealed a calcified bursitis.

"Final diagnosis: 1. Hypertension. 2. Hypertensive enlarged heart; dilated aorta, regular; bursitis, chronic, with calcification right; prostatic hypertrophy, mild; prostatism, chronic."

THE COURT: What was the date of that, Mr. Feldman?

MR. FELDMAN: That was January 2, 1947, Your Honor.

BY MR. FELDMAN:

Q. Do you have in the record an examination that was made of the defendant by a VA physician on June 22, 1949, Mr. Bishop?

A. Yes, sir.

MR. FELDMAN: Your Honor, I would like to offer this report in evidence.

MR. CAPUTI: I object, Your Honor, on the same ground.

THE COURT: Do you object to all of it or only part of it?

MR. CAPUTI: All of it, Your Honor.

THE COURT: Very well. I would like to see it.

(The report was handed to the Court.)

THE COURT: Objection sustained.

MR. FELDMAN: Sustained to all of it, Your Honor?

125 THE COURT: I am going to sustain the objection to this. A lot of it, of course, is repetitious of things that are already in but I suppose what you want is the diagnosis and opinions and Mr. Caputi objects to that and I will sustain the objection.

BY MR. FELDMAN:

Q. Mr. Bishop, do you have a record of an examination of the defendant that was made at the Veterans Administration Hospital at Hines, Illinois, during the period October 11, 1952 to November 21, 1952? A. I have a summary.

MR. FELDMAN: I desire to offer this in evidence, Your Honor.

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MR. CAPUTI: My objection as to this, Your Honor, would be on the grounds of relevancy.

THE COURT: Very well. I will look at it.

(The report was handed to the Court.)

THE COURT: This report indicates, Mr. Feldman, that in October and November, 1952, this defendant was troubled with hypertension and a coronary occlusion which I suppose is a form of heart attack. How is that relevant to the issues of this case?

MR. FELDMAN: Your Honor, I feel, in view of the medical records and his over-all physical and mental condition, that that is pertinent.

126 THE COURT: I understand, but you are just repeating that it is pertinent. How is it pertinent? You are pleading insanity in behalf of the defendant.

MR. FELDMAN: Yes.

THE COURT: How does the fact that the defendant had a heart attack have any bearing on the question whether he was mentally competent or incompetent?

MR. FELDMAN: Your Honor, arterio sclerosis, hypertension, may have an effect.

THE COURT: I think I will admit this. To me, it seems very remote and very far-fetched. However, there is no harm in admitting it. I will overrule the objection. You may read such portions of that page as you see fit, Mr. Feldman.

MR. FELDMAN: Ladies and gentlemen of the jury and Your Honor, this is a report of the Veterans Administration Hospital at Hines, Illinois, under date of December 10, 1952, showing that the defendant was admitted there on October 11, 1952 and discharged November 21, 1952. (Reading) "This 60-year white male states that one day, prior to entry on October 11, 1952, while walking down the street he felt that he suddenly could not breathe. He felt choked. At the same time, he noticed a very sharp pain substantially which was relieved slightly when he stopped and rested. He took nitroglycerin. However,

127 the nitroglycerin did not relieve the pain at this time. He went back to his room, where the pain became more severe. He then called a local physician who gave him an injection and the pain was relieved. The patient states he experienced perspiration and chills during this attack. Diagnosis: Disease of the heart. Cause: Hypertension and coronary arteriosclerosis. Coronary occlusion. Miocardio insufficiency, class 4."

* * * *

128 THE COURT: I am going to admit the Veterans Administration ratings.

MR. CAPUTI: I know Your Honor has ruled but I would like to inform Your Honor as to what I object to about this rating.

THE COURT: Yes, you may state it in open court.

MR. CAPUTI: It deals with the mental aspect and I would like to tell Your Honor at the bench.

THE COURT: We are having too many bench conferences. We are making very slow progress.

(At the bench:)

MR. CAPUTI: The rating, Your Honor, shows he is a psychopathic personality, paranoiad type, and that is what I object to.

THE COURT: I thought the rating was percentage of disability.

MR. CAPUTI: So did I, but that is what that rating will disclose.

THE COURT: I am going to exclude that.

MR. FELDMAN: I think the rating is based on disability.

THE COURT: I am going to exclude diagnosis. I thought rating was a percentage basis of the nature of the diagnosis I am going to exclude.

MR. FELDMAN: But the rating is based upon certain physical

129 and mental factors.

THE COURT: I am going to exclude that.

MR. FELDMAN: May I have the basis for the rating as to all the facts with the exclusion of the conversation at the bench, Your Honor?

THE COURT: No. If there is a percentage rating, I will admit the percentage rating but I will not admit the diagnosis upon which that

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rating is based for the reasons that I have indicated because that is not admissible under the Federal shop book rule.

(End of bench conference.)

BY MR. FELDMAN:

Q. Mr. Bishop, can you tell us what percentage the defendant was rated for disability in 1942? A. A hundred percent, I presume.

THE COURT: I beg your pardon?

THE WITNESS: A hundred percent, I presume. It is a particular rating, if I may explain there --

THE COURT: No. We just want the percentage, if there is a percentage.

THE WITNESS: Permanent total --

THE COURT: His rating is permanently and totally disabled.

BY MR. FELDMAN:

Q. Is the defendant's rating at the present time still permanently
130 and totally disabled? A. Yes.

* * * *

MR. FELDMAN: At this time, if the Court please, I should like to offer in evidence a certified copy from the District Court for the Eastern District of Pennsylvania.

THE COURT: Do not tell us what it shows. Give us the date
131 and name of the document and stop right there.

MR. FELDMAN: The date of the document is October 13, 1954, by the United States District Court for the Eastern District of Pennsylvania sitting in Philadelphia, commitment for mental --

THE COURT: Do not tell us what is in the document. I have told you that before. Do not transgress again. What are you offering in evidence?

MR. FELDMAN: This document --

THE COURT: What is the date and title?

MR. FELDMAN: It is dated October 13, 1954 in the case of United States of America v. Louis Polisnick.

THE COURT: Very well, show it to Mr. Caputi.

(The document was handed counsel.)

MR. CAPUTI: I object to it, Your Honor.

THE COURT: Objection sustained.

* * * *

LOUIS POLISNICK

* * * *

132 DIRECT EXAMINATION

* * * *

138 BY MR. FELDMAN:

Q. And do you know approximately when that was that you came to the District of Columbia with Sergeant Hayden? A. To the best of my recollection.

Q. Do you know approximately when, to the best of your recollection? Can you tell us when? You came to the District of Columbia with Sergeant Hayden. A. He had me here five years ago, ten years ago. They brought me here.

THE COURT: Do not ask any unnecessary questions, Mr. Feldman.

* * * *

147 SAMUEL LEOPOLD

* * * *

148 DIRECT EXAMINATION

* * * *

BY MR. FELDMAN:

Q. What is your profession, Doctor? A. I am a psychiatrist.

* * * *

149 Q. What is your present employment, Doctor? A. I am Mental Director at the Municipal Court of Philadelphia.

* * * *

THE WITNESS: And Director of the Neuropsychiatric Department.

THE COURT: I think he is qualified.

BY MR. FELDMAN:

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Q. In your capacity as Mental Director, did you have occasion, in 1954, to examine the defendant, Louis Polisnick? A. Yes.

* * * *

150 THE WITNESS: I found the man of limited education, quite talkative. His emotional tone was flat and he gave me the impression of being in a disorganized mental state of an old schizophrenic.

THE COURT: You say impression. We would like to have your opinion and not just your impression.

THE WITNESS: That was my opinion. This was based not only on the examination but on the history that was furnished me by the Chief Probation Officer of the Federal Court.

BY MR. FELDMAN:

Q. Doctor, -- A. I would like to continue.

THE COURT: Yes, you may continue.

THE WITNESS: I also found that he had been in numerous conflicts with the law. Would you like to know the recommendation I made to it, Judge?

THE COURT: No. You say he is a schizophrenic. Is that a mental disease?

151 THE WITNESS: Yes, that is a mental disease.

BY MR. FELDMAN:

Q. Doctor, I would appreciate it if you would define for us some terms. A. I can't hear you.

Q. I would appreciate, Doctor, if you would define some terms that have come out in prior testimony.

THE COURT: Ask him the direct question.

BY MR. FELDMAN:

Q. What is meant, Doctor, by the term hypertension?

THE COURT: We know it is high blood pressure.

BY MR. FELDMAN:

Q. What is meant, Doctor, by the term "arteriosclerosis"? A. Am I here as a witness? I don't wish to appear --

THE COURT: Arteriosclerosis is a dictionary word. It is hardening of the arteries, as I understand it.

BY MR. FELDMAN:

Q. Doctor, based on your examination, did you have occasion in October of 1954 to testify in the District Court in Philadelphia?

A. No.

Q. You did not? A. No.

Q. Did you make a report to the District Court? A. I made a report to Judge Cleary.

152 Q. Doctor, with reference to your examination that you made in 1954 and the medical testimony or medical information you have received from me and have heard at the trial, can you give us your opinion as to whether or not this psychotic condition had existed prior to your examination and, if so, for how long? A. From the history, I found that he had been in many mental hospitals and I assumed, from that history, that he had had this condition over quite a few years.

THE COURT: No, it is not what you assumed. Have you an opinion?

THE WITNESS: My opinion was that he suffered from this condition for many years.

BY MR. FELDMAN:

Q. Doctor, when you examined the defendant in 1954, do you recall what the charge was made by the court at that time?

THE COURT: I do not think that makes any difference.

MR. FELDMAN: It is the same type --

THE COURT: No, that makes no difference. That is absolutely irrelevant.

BY MR. FELDMAN:

Q. Doctor, would a man suffering from the condition that you diagnosed in 1954 be able to perform ordinary transactions, such as purchasing merchandise, without his condition being noticeable to

153 someone else? A. Yes, that is quite possible.

MR. FELDMAN: I have no further questions, Your Honor.

THE COURT: I suggest counsel come to the bench.

(At the bench:)

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THE COURT: Mr. Feldman, I want to call your attention to this, in a desire to be of help. You know the Monte Durham case holds that two things must be established in order to establish the defense of insanity. First, there is a mental disease. This witness testified that this defendant had a mental disease. Second, it must be established that the crime was the product of a mental disease.

MR. FELDMAN: Your Honor, it is my understanding of the Durham decision --

THE COURT: I am telling you what the Durham decision holds. You do not have to ask this witness any more questions but you have not established the defense of insanity unless you introduce evidence from which the jury can draw the inference that the crime was the product of a mental disease. Let me repeat. You have to establish two things: First, the presence of mental disease at the time of the crime. This witness' testimony is to that effect. Second, you have to establish that
154 the crime was the product of this mental disease.

MR. FELDMAN: Your Honor, that would almost be asking the impossible from the Doctor.

THE COURT: Yes, you do. We have had those questions in lots of other cases.

MR. FELDMAN: But if the defendant was psychotic at the time --

THE COURT: Psychotic people -- do not be so obstinate. Why do you not ask the Doctor whether he has an opinion whether this crime was the product of that mental disease? You do not have to ask him that if you do not want to but, if you do not ask him that and he does not answer yes, you have not established your defense. You may go back to counsel table.

(End of bench conference.)

BY MR. FELDMAN:

Q. Doctor Leopold, is it your opinion, sir, --

THE COURT: No. Do not state. Ask him what his opinion is. Do not give the opinion first.

BY MR. FELDMAN:

Q. Can you give us your opinion, Doctor, as to whether or not the alleged forgeries that took place in this case in September and November of 1953 were the product of psychosis which you diagnosed in 1954?

A. No, I would not give an opinion on that without having examined the

155 man at that time. He could have been in a state of remission because these psychoses partially clear up because they get out of hospitals and then there is a disturbance again.

THE COURT: In other words, remission is a technical term for recovery, is that it?

THE WITNESS: Partial recovery.

* * * *

156 BY MR. FELDMAN:

Q. Doctor, you have testified that in September or November, 1953, there may have been a remission? A. I said I didn't know what condition he was in then. I would have had to examine him.

Q. But you have testified that the condition you diagnosed in 1954 had been in existence for several years? A. Yes.

Q. Doctor -- A. Will you come a little closer so I can understand you?

Q. With reference to the mental condition that you discovered in the defendant in 1954, what effect would arteriosclerosis or hypertension or cardiac condition have on the disease such as you diagnosed in 1954? A. It would increase the mental condition, exaggerate his symptoms.

157 Q. Doctor, is it typical in this type of mental illness, such as you diagnosed in 1954, that there be anti-social behavior on the part of the individual? A. Not necessarily.

Q. But may it be present? A. Yes. This anti-social behavior can be present in organic brain disease, in psychoses, in epilepsy and in neuroses and it also can occur as purely a phenomenon of an individual who neither has a psychosis or anything.

Q. Doctor, what is meant by the psychiatric term "criminalism or crime tendency"? A. Tendencies mean the impulse to anti-social behavior, sir.

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Q. Is this impulse caused by the psychoses of mental disease if a criminalistic tendency is present? A. It is not caused by the presence. It can be co-existing with the mental disease but not caused by the mental disease. If it was caused by the mental disease, many individuals who are mental patients would be anti-social, but they are not.

Q. But in some anti-social behavior, it can be a symptomatic mental disease? A. It does occur in mental disease.

Q. Doctor, you heard the testimony of the defendant in court this morning. What is your opinion, from a psychiatric standpoint, of

158 his present testimony?

MR. CAPUTI: I object, if Your Honor please.

THE COURT: How is that relevant, Mr. Feldman? Of course, what we have to determine is his mental condition as of September, 1953, not as of today.

BY MR. FELDMAN:

Q. Doctor, in view of the medical testimony today and your examination of the defendant in 1954, can you tell us approximately how many years you think this psychosis was present in the defendant? Can you give us any ideas? A. No, I could not.

Q. Doctor, as you are aware, there have been many and varying diagnoses as to the defendant's mental condition.

THE COURT: Do not tell the witness anything. Ask questions.

BY MR. FELDMAN:

Q. Doctor, you are in receipt of medical evidence as to the defendant's mental capacity throughout the years --

THE COURT: You are making a statement. Ask questions. Do not testify.

BY MR. FELDMAN:

Q. Doctor, in 1953 and 1954, was the defendant's mental condition very difficult of diagnoses?

MR. CAPUTI: I object, if Your Honor please.

THE COURT: I will allow that. I do not know that it is

159 important.

THE WITNESS: You want me to answer that?

THE COURT: Yes, I will say that it was difficult to diagnose.

* * * *

161 CROSS EXAMINATION

BY MR. CAPUTI:

Q. Not having examined this defendant in 1953, this defendant, Polisnick --

THE COURT: You said you had not?

THE WITNESS: That is right, not having examined him in 1953.

BY MR. CAPUTI:

Q. You cannot say whether, in September and November of 1953, whether he had any psychosis? A. That is correct.

MR. CAPUTI: That is all I have.

BY THE COURT:

Q. Doctor, I would like to ask you a few questions. This defendant was charged with forging four different checks on non-existent bank accounts and forging the signature of a fictitious maker, putting in the name of a fictitious payee, forging the endorsement of the fictitious payee and then presenting each of these checks at four different stores on four different dates here in the District of Columbia and having those checks cashed in the months of September and November, 1953. I would like to ask you whether or not you can express an opinion as to whether, if it were to be found that he committed the acts with which he is charged, those actions could accompany or be the product of the type of mental

162 disease that you found this defendant to be suffering from.

A. That act has no relation to the mental disease that I found. It could be present in the mental disease that I found, but it has no symptoms, it is not diagnostic of that mental disease.

Q. In other words, it is not the type of act that would be the product of that mental disease? A. Right. I would like to state that, if I may --

Q. Yes, indeed. A. That the check that I saw that he made out which indicated an abnormal state, was handmade by pencil payable to

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the bearer, $100,000, and anybody seeing that check and he presents it to a bank showing that at the time that I saw him that that was a sign of a disturbed mental disease, but those checks --

Q. Are less than $100. A. -- but those checks are not the result of that mental disease, necessarily. It could be the habit of, you know, a sociopathic individual, which he evidently was all his life. Of course, that is only conjecture on my part because the reason why I did not express myself on that was because that would require intimate study of his historical past and related to his present, so one could judge whether it was due to mental disease or bad character formation from early youth.

163 Q. Can you express an opinion on this further question? Is it possible for an insane person at the time he is suffering from a mental disease that you diagnosed in this defendant to plan deliberately and carry out the four acts over a period of a couple of months that this defendant is charged with? A. Not if he is in a disturbed psychotic state. If that is cleverly worked out, he could not be in a psychotic state.

THE COURT: Any further questions?

REDIRECT EXAMINATION

BY MR. FELDMAN:

Q. Doctor, you mentioned this $100,000 check. I presume this came to your attention in September of 1954? A. 1954.

Q. Do you know approximately what date that check was made out? A. No, I do not. I was only concerned with the abnormality of the check and the abnormality of the behavior that dared to present a check that, on the face of it, nobody would honor.

Q. At that time, based on that check, were you examining the defendant for a charge in the Municipal Court of Philadelphia or the United States District Court in Philadelphia? A. The Federal Court.

164 This was for the Federal Court.

Q. And was that particular check the subject of the offense with which he was charged by the Federal Court at that time? A. Yes, forgery. That was one. There may have been others which I did not

see. That was the only one that I saw.

Q. Doctor, you state that anti-social behavior is sometimes symptomatic of a psychosis? A. Right.

Q. Why can't this anti-social behavior be done in a clever manner and still be the subject of a psychosis? A. That was the only way you could test, that would be by examining the individual at that time.

Q. Is it possible, Doctor, that at the time that these checks were allegedly forged and passed by Polisnick, that he was, in fact, suffering from a psychosis state? Is it possible? A. It is possible. He might not have been suffering from a psychosis at that time.

Q. Is it possible that he could have been suffering from a psychosis? A. I would not want to answer that -- yes, I suppose he could be, because I have seen individuals who have been suffering with a psychosis and yet able to carry on in a fairly normal manner.

Q. And it is also a fact, isn't it, Doctor, that when a man

165 suffering from a psychosis, such as your diagnosis of Polisnick, could appear entirely normal to other people and still be suffering at the time? A. Yes, he could appear normal at the time.

Q. And isn't it true that a man suffering from a psychosis like that could be entirely clever? A. I didn't get that.

Q. Isn't it also possible that an individual suffering from such a psychosis, as Mr. Polisnick was suffering when you diagnosed him in 1954, could be very clever at the time he performed certain acts and still be suffering from a psychosis? A. I suppose so.

* * * *

192 CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, this defendant, Louis Polisnick, is on trial on four charges known in the law as forgery and uttering. He is charged with four distinct transactions, namely, four different occasions of forging a check on the First National Bank of Lynchburg, Virginia, in the name of a fictitious non-existent business concern, General Pump and Manufacturing Company. He is charged with forging the signature on this check, inserting the name of a

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fictitious non-existent payee and forging the endorsement of this fictitious non-existent payee.

Then he is charged, in each instance, with going to a store in the District of Columbia and cashing each of these checks on four different occasions in four different stores.

The first count of the indictment charges the forgery of such a check for $84.36 on September 26, 1953.

The second count of the indictment charges the defendant with uttering this check. By uttering is meant passing the check.

193 The third and fourth counts relate to the second check which is charged to have been forged and uttered, that is, passed on September 27, 1953, forged in the name of a non-existent fictitious maker to the order of a fictitious payee with the endorsement of the fictitious payee forged.

The third count charges the forgery of a check and the fourth count charges the uttering, that is, the passing of the check.

The fifth and sixth counts relate to similar transactions and involve a check claimed to have been forged and passed on November 28, 1953.

The seventh and eighth counts relate to another similar check claimed to have been forged and uttered, that is, passed also on November 28. Each of the counts charge that each of the checks were cashed by the defendant in a different store in the District of Columbia.

The defense is two-fold; first, the defendant denies that he forged and uttered these checks and, second, it is claimed that if he did so, he was insane at the time of the offense, that is, to use the legal term, was not mentally competent to commit the offense and, therefore, should not be held responsible.

It now becomes your duty to determine whether the defendant is guilty or not guilty of the offenses with which he is charged.

194 At the outset, I want to remind you that, as I have told most of you on other occasions and in fact all of you on other occasions, it is my function to instruct the jury as to the law. The jury is bound and obligated to follow the Court's instructions as to the law but you, ladies

and gentlemen of the jury, are the sole judges of the facts and must determine the facts yourselves on the basis of the evidence introduced at this trial.

I have still another function to perform, namely, to summarize and discuss and comment on the evidence to the extent to which I deem it desirable, but my discussion, summary and comments on the facts and on the evidence is not binding on you. It is intended merely to aid and assist you in arriving at your conclusions and you need to attach to it only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence in any particular differs from my recollection or my understanding or my view of the evidence, then it is your recollection, your understanding and your view of the evidence that must prevail because, I repeat, the final decision on the facts is solely within your domain. My instructions are binding on you only as to the law.

I shall commence by recapitulating, briefly, some general principles of law that are applicable to all criminal cases, including, of course, this one. I shall summarize them briefly because I have explained them to you on other occasions in greater detail. In fact, per-
195 haps it is superfluous for me to refer to them again, but I must do so even at the risk of wearisome repetition because the law requires me to bring them to the attention of the jury in each separate case.

First, the fact that a defendant has been indicted and is charged with a crime is not, in itself, to be taken as an indication of guilt because an indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Second, every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to him throughout the trial.

Third, the burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense charged, the jury

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must find him not guilty but, as I have had occasion to say to you before, proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to a mathematical or an absolute certainty for there are not absolute certainties except perhaps in the field of mathematics and astronomy.

By a reasonable doubt, as its very name implies, is meant a doubt based on reason and not just some whimsical speculation or some
196 capricious conjecture. Proof beyond a reasonable doubt may be defined as such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charges against the defendant, you will consider and weigh the testimony of all of the witnesses who have testified before you, as well as all the circumstances concerning which testimony has been introduced. Circumstances frequently cast an illuminating light on oral testimony.

You are the sole judges of the credibility of witnesses. In other words, it is for you and you alone to determine whether to believe any witness and the extent to which any witness should be credited. If you find that any witness wilfully testified falsely as to any material fact concerning which the witness could not have reasonably been mistaken, you are then at liberty, if you feel it wise to do so, to disregard the entire testimony of that witness or any part of that witness' testimony.

This brings me to a consideration of the specific issues of this case.

The crimes of forgery and uttering are defined in the code of laws of the District of Columbia as follows and I shall read to you the
19 pertinent part of the statute:

"Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another,

or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another,"

shall be punished by the penalties the statute prescribes.

To constitute the crime of forgery, three elements must exist. First, there must be a false making of some written instrument. Second, the instrument must be apparently capable of effecting a fraud. Third, there must be a fraudulent intent.

In this instance, the defendant is charged with falsely making four written instruments, to wit: checks. A check is obviously an instrument capable of effecting a fraud.

A fraudulent intent, naturally, cannot be proven directly. It is impossible to scrutinize or to see the operations of the mind of another human being. Fraudulent intent ordinarily is proven indirectly. Fraudulent intent may be gathered from what the defendant does or says or from the surrounding circumstances or even from the act itself because every sane person is presumed to intend the natural consequences
198 of his act.

The crime of uttering consists of delivering or passing such a forged instrument to another person with intent to defraud or prejudice the right of that other person with intent to defraud or injure him.

The evidence that the Government introduced may be briefly and, in a skeletonized fashion, summarized as follows: The Government called each of the four storekeepers whom it claims were defrauded. Each of the four storekeepers identified the check that was presented to him and testified that he accepted the check and cashed it. Three of the storekeepers identified the defendant as the man who presented the checks to them. The fourth was unable to do so. However, the examiner of the questioned documents of the Metropolitan Police Department examined each of the four checks and compared the handwriting on the checks with specimens of the defendant's handwriting which were obtained from the

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defendant and this expert expressed his opinion that each of the four checks were written in the defendant's handwriting.

An official of the First National Bank of Lynchburg, Virginia, testified that there was no such account as General Pump and Manufacturing Company. In fact, as far as he knew, there was no such concern in Lynchburg.

The defendant denies that he forged or uttered these checks and he testified on the witness stand that actually, at the time these
199 offenses are charged to have been committed, September and November, 1953, he was a prisoner in a Philadelphia prison.

The Government then produced records of that prison which show that the defendant was not in that prison at all during that period and was not committed there until some time in February, 1954, three or four months after these offenses took place.

So much for the evidence on both sides as to the commission of the offense. Of course, it is for you to determine, on the basis of this evidence, whether the defendant committed the offenses with which he is charged. Naturally, if you do not find the commission of the offenses proved beyond a reasonable doubt, your verdict should be not guilty but, if you find that the charges against the defendant have been established by this evidence, then you have still another question to determine.

It is claimed, in behalf of the defendant, that he did not have the mental capacity to commit the crimes with which he is charged because it is alleged that he was insane at the time that the crimes were committed and that the crimes were the product of this insanity. If you find this to be the case, then your verdict should be not guilty on the ground of insanity. Your verdict should expressly state, in that event, you find the defendant not guilty on the ground of insanity and not merely
200 not guilty.

In certain instances the law, indeed, does not hold an insane person responsible for his acts. In order to be responsible for his acts, the defendant must have the mental capacity to commit the offense with which he is charged but it is not in every case in which the accused is

suffering from some mental abnormality or some mental disease or mental defect that he is not to be held responsible for his acts. There are many abnormal persons whom the law holds responsible in certain instances for a crime that such a person commits. Obviously, there are good reasons in public policy for this rule of law. In order not to be held responsible for his acts and to be found not guilty on the ground of insanity, the law requires that the following two elements must appear:

First, it must appear that at the time the offenses were committed, the defendant was suffering from some mental disease or mental defect or, to put it in a somewhat different way, that he must have been suffering from a disease or defective mental condition at the time the crime was committed. That, however, standing alone is not sufficient.

Second, it must appear that the crime was the product of this mental disease or of this mental defect. If you reach the conclusion that the defendant was suffering from a mental disease or mental defect at the time the crime was committed and also that the criminal act was the result or product of the mental disease or mental defect, then you
201 must bring in a verdict of not guilty on the ground of insanity.

On the other hand, if you are convinced beyond a reasonable doubt, either that at the time of the commission of the offense, the defendant was not suffering from a mental disease or mental defect or even if he were so suffering, that the crime was not the product or result of mental disease or mental defect, then you may find the defendant guilty provided, of course, that you are convinced beyond a reasonable doubt that he committed the acts with which he is charged.

Naturally, every person is presumed to be sane until the contrary appears. This presumption is founded on human experience. This presumption does not mean, however, that the burden of proof is on the defendant to prove insanity. If the defense offers some evidence that the defendant was legally insane at the time of the commission of the offense, the presumption of sanity of the accused disappears. In other words, on the issue of mental capacity, just as on every other

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issue of the case, the burden of proof is on the Government and that burden must be sustained beyond a reasonable doubt.

In determining whether the defendant was insane, that is, whether he was suffering from any mental disease or mental defect on the day of the commission of the crime and whether, if he were so suffering, the crime was a product of such disease or defect, you have a right to consider whether he knew the difference between right or
202 wrong; whether he acted under the compulsion of an irresistible impulse or had been deprived or lost the power of will, but you are not limited to these matters but may consider all of the evidence in order to reach a conclusion as to whether he was or was not suffering from a mental disease or mental defect at the time in question and, if he were so suffering, whether his acts were the product of such mental disease or mental defect.

If you find that the defendant was not suffering from a mental disease or mental defect at the time of the commission of the offenses, then, of course, you may not find him not guilty on the ground of insanity but, if you find that he was suffering from a mental disease or mental defect at the time, I repeat that is not sufficient to justify a verdict of not guilty on the ground of insanity unless you also find that the crime was produced by his insanity or mental disease or mental defect. Obviously, even an insane person may do things at times that are entirely rational, in and of themselves, and are not the product of a mental disease. It is only if the criminal act is itself a product of a diseased or defective state of mind that a person is entitled to be acquitted on the ground of insanity.

If the jury should find the defendant not guilty on the ground of insanity, the Court is then required to order the defendant to be confined in a hospital for the mentally ill and the defendant could not be
203 released unless and until the superintendent of the hospital finds and certifies the defendant has recovered his sanity, that he will not, within the reasonable future, be dangerous to himself and others and is entitled to his unconditional release.

What is the evidence on the issue of insanity? There was evidence that back in 1942, the defendant was in a mental hospital and that he remained there from 1942 until 1944 and that apparently he was in a mental hospital on other occasions. Dr. Samuel Leopold, a psychiatrist, was called as a witness by the defense. Dr. Leopold, it appears, is a psychiatrist connected with the Philadelphia courts. You have a right, if you choose to do so, to accept his testimony as that of an impartial and competent expert because he was not hired by either side but is an official of the government in Philadelphia. However, his testimony is not binding on you because the final decision must be yours but you may attach such weight to his testimony as you feel that it should receive. He testified that he examined the defendant in September, 1954, between ten months and a year after the offenses charged in this indictment.

Dr. Leopold said that he found that the defendant was at that time suffering from a mental disease known technically as schizophrenia. He also found that the disease was of many years standing but he could not specifically say whether the defendant was suffering from it in

204 September, October, and November of 1953 because Dr. Leopold said the defendant might have been in a state of remission. Remission, he explained, is a technical term for partial recovery. He stated that the defendant's history showed that he had such periods of remission, that is, periods of partial recovery from time to time.

Dr. Leopold also testified that the crimes charged in this case would not necessarily be the product of the defendant's mental disease and, in fact, if he had been in a disturbed state at the time, he could not have planned and carried out the crimes charged in this indictment.

Ladies and gentlemen of the jury, in conclusion, you have a right to bring in any one of three verdicts. You will bring in a separate verdict on each of the eight counts of the indictment. In each instance, your verdict may be any one of three: Either guilty or not guilty or not guilty on the ground of insanity, and always, of course, you are aware that your verdict must be reached by unanimous vote.

I repeat what I said to you at the beginning of my remarks, that my discussion of the evidence is not binding on you. It is intended only

to be advisory and helpful. Your understanding and your recollection and your view of the evidence must prevail. You are the final judges of the facts. The decision on the facts is your function and your responsibility.

* * * *

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14089

LOUIS POLISNIK, APPELLANT 262

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.
CARL W. BELCHER,
VICTOR W. CAPUTY,
JOHN D. LANE,
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United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY - 9 1958
Joseph W. Stewart
CLERK

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1. Are handwriting specimens, voluntarily given by appellant (lawfully arrested for forgery), within a few minutes after arrival at headquarters, excludable under the *Mallory* case?

2. It is not settled that records of mental diagnoses are inadmissible?

3. Did not the trial court correctly summarize psychiatric testimony, and is this question reached where there was no misunderstanding below and opportunity for suggested corrections was afforded trial counsel?

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United States Court of Appeals

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No. 14089

LOUIS POLISNIK, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

(a) The commission of the crime

The indictment, in eight counts, charged appellant with forging and uttering four checks and passing them at four Washington stores in the months of September and November, 1953 (R. 219–221). Found guilty by a jury on all counts, appellant was sentenced on the indictment to imprisonment from sixteen months to four years (R. 232). This appeal is from the judgment of conviction.

The checks, in each instance, bore the name "General Pump & Mfg. Co., Lynchburg, Virginia", which was, in fact, a non-existent institution (R. 19). They were printed payroll checks, drawn on the "Payroll Account" of the company, the amount being inserted by a check-writing machine (R. 16; Gov. Ex's 1–4, R. 28, 70, 42, 50). There was no such account, present or past, at the drawee bank, the First National Bank of Lynchburg, Virginia (R. 17–19).

With three of the defrauded merchants, two owners of clothing stores (Mr. Shafer, R. 26 and Mr. Bomstein, R. 43) and a bicycle salesman (Mr. Duehring, R. 51) the appellant had

spent considerable time, ranging from a half-hour to forty-five minutes, selecting merchandise.[1] The fourth person defrauded, Mr. Miles, manager of a Food Fair Supermarket, had approved appellant's check but could only give a general physical description (R. 34). The other three merchants positively identified appellant at the trial (R. 25, 40, 47). Not only had each of these small merchants spent considerable time with appellant, but strong reminders were furnished in the form of checks returned in about a week (R. 57). Mr. Duehring had made a prompt complaint, identifying appellant from photographs shortly after the crime (R. 52, 64). The four forged instruments were in the hands of the check squad about ten days after they were uttered (R. 57).

The purported payee of a check was either "Eric Fisher" or "Edwin Inman" (Gov. Ex's 1–4, *supra*). Mr. Miles had required and received identification (R. 35). Among identification furnished Mr. Shafer was a social security card (R. 24). Appellant told Mr. Shafer he was the father of a customer and that he was a travelling salesman for the non-existent pump firm (R. 24, 29). Similar methods were employed with the other merchants (*e.g.*, R. 44, 51).

According to the expert, Ira N. Gullickson, the endorsements on the four checks, "Eric Fisher" or "Edwin Inman", were in appellants handwriting (R. 68–70). In addition each check had been signed by a purported officer of the non-existent company (Gov. Ex's 1–4, *supra*). These official signatures were symmetrical and shaded. In an attempt to disguise, apparent to the expert after study, the endorsements were written with a stubby pen in letters of a different size. Nevertheless the expert concluded that the signatures of the purported maker, as well as the endorsements of the fictitious employees, were in appellant's handwriting (R. 68–76).

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[1] Two checks were in the amount of $84.36 each, and the next two amounted to, respectively, $83.58 and $93.58 (Gov. Ex's 1–4, *supra*). In all instances, except the bicycle transaction, merchandise as well as cash was procured (R. 25, 43, 48).

(b) The defenses—primarily insanity

Appellant took the stand in his own defense (R. 132). His testimony throughout was evasive, if not more [2] (R. 132–147). This was in contrast to a precise memory when it served his purpose.[3] During the times of the perpetration of the instant crimes (September–November 1953) appellant claimed to have been in Moyamensing Prison, Philadelphia (R. 136). Records of that institution revealed he was not received there until the following year (R. 186–187).

In preparation of the defense of insanity appellant had been permitted to subpoena, without prepayment, out-of-town witnesses, one of them being Dr. Samuel Leopold, a psychiatrist who is Mental Director of the Municipal Court of Philadelphia (R. 228, 148–49). At the request of the defense Dr. Leopold was given permission to be present in court during the whole trial (R. 21).

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[2] Prior to trial appellant had been reported competent to understand the proceedings and aid in his defense (R. 227). Shortly after trial he was able to detail in writing, with great clarity, in a *pro se* motion to modify sentence, his autobiographical chronology going back many years, including his arrest in the instant case (R. 235–36). Yet on the stand he evaded all details by making at intervals such purportedly "delusional" statements as that he had been "investigating jails" rather than an inmate (R. 133). This maneuver permitted a failure to remember his having been confronted by the complainants (R. 134). It further permitted him to deny his numerous convictions (R. 142). At sentencing the trial court described appellant's forty-year record of convictions of forgery as the longest of its kind the judge had ever seen (R. 212).

[3] Not only did appellant, after the trial, exhibit his precise knowledge of his incarcerations, as developed in footnote 2, but he had also exhibited the same knowledge before the trial in aid of a motion to suppress handwriting specimen cards (R. 223). On June 8, 1956 appellant took the stand at a hearing on the motion to suppress (R. 254). He recited, for example, that he had been turned over to Sergeant Hayden of the Check Squad by the deputy warden of Union County Jail, Elizabeth, N.J. on the afternoon of March 8, 1956, and that they took a train to Washington about 2:15 P.M. In contrast, at the trial appellant claimed no memory of these events (*e.g.*, R. 139, 141).

As to the substance of the hearing on the motion to suppress (see Appellant's Brief, p. 2), Sergeant Hayden testified that appellant told him he was not in Washington at the time of the crimes. When asked to give handwriting samples he said he would give as much as the sergeant wanted. The sergeant testified the samples were given voluntarily, without duress or promises. (References are to the transcript of the hearing on the motion, now being transcribed for insertion in the record.)

In addition the defense presented, through custodians, records of the Mattawan State Hospital, New York, an institution described to the jury as a hospital for insane criminals (R. 88–89). Also excerpts from appellant's file at the Veterans Administration were admitted (R. 107). These records were admitted to show, among other things, that appellant had been an inmate at Mattawan from February 16, 1942 until his discharge in September, 1944 (R. 89). A case history, taken at that institution was read (R. 104–105).

From the Veterans Administration file there was admitted a report (all except mental diagnosis) indicating appellant's admission to Springfield Mental Hospital, Missouri, in November, 1936. A report of appellant's stay at the Veterans Administration Hospital, Bronx, New York, November 21, 1946 to January 2, 1947 was admitted, except for its mental diagnosis (R. 122).

In general, it may be said that all pertinent and competent records were admitted, except such as to his physical condition as were cumulative,[4] or such portions as contained mental diagnoses. As to the diagnoses the trial judge noted that medical testimony would be forthcoming (R. 99).

Dr. Feldman testified that the request of the United States District Court (E.D. Pa.), in which tribunal charges against appellant were pending, he had examined appellant on September 27, 1954 (R. 149). (This was a year to fourteen months after the instant offenses (R. 219–221).

Based on his examination, and a history furnished by the Chief Probation Officer of the U.S. District Court, Dr. Leopold had concluded that in September, 1954, appellant was in the "disturbed state of an old schizophrenic". This the doctor reported to the court in Philadelphia (R. 149–151). In the doctor's opinion the appellant had had this psychosis over many years (R. 153).

As to appellant's criminal activities in late 1953, and what produced them, the doctor stated appellant could have been in

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[4] Much of this data related to appellant's hypertension which culminated in heart disease in 1952 (R. 114, 127). At sentencing, the court recommended commitment to the Medical Center at Springfield, Missouri (R. 212).

a state of remission (partial recovery) because such patients "get out of the hospital and then there is a disturbance again" (R. 155). The doctor testified that such criminal activities as appellant's were not of diagnostic significance in determining the existing of schizophrenia (R. 157, 162). If such were the case many such patients "would be anti-social, but they are not" (R. 157). Appellant evidently was a sociopathic individual all his life (R. 162). Appellant's behavior was not necessarily associated with his psychosis (R. 157).

While the doctor recognized that a disturbed schizophrenic could possibly conduct himself in ordinary affairs with some cleverness (R. 164), yet the specific acts of appellant over two months in 1953 were, in his opinion, not likely to be the product of appellant's mental disease (R. 162). In this connection the doctor recounted that, examining appellant in 1954, he had been provided with a current check of appellant's in aid of psychiatric study of the aberrancy of appellant's actions as of that time (R. 163–164). The 1954 check "indicated an abnormal state". The check was handwritten, in pencil, and payable to the bearer in the amount of one hundred thousand dollars. The fact that appellant presented such a check "was a sign of a disturbed mental disease". The checks at bar, the doctor noted, were entirely different (R. 162). Appellant could not have prepared and uttered the checks, in the manner described in the record, had he "been in a psychotic state" (R. 163).

STATUTE INVOLVED

31 STAT. 1326 (1901), as amended, 22 D.C. CODE § 1401 (1951):

> Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years.

SUMMARY OF ARGUMENT

I

Samples of handwriting, voluntarily given at headquarters by a person lawfully arrested for forgery, were not excludable under the *Mallory* case.

II

It is settled that the records of mental diagnoses are inadmissible. Appellant was not injured by the application of this rule as his medical history, in sum, was adequately presented to the jury, these records having been admitted to show physical illnesses, mental case history, and the fact and dates of mental treatment in hospitals. A psychiatrist, for the defense, testified as to diagnosis.

III

The court correctly summarized the psychiatrist's testimony that appellant could not have perpetrated the crimes while in a disturbed mental state.

ARGUMENT

I. Handwriting specimens were not excludable

Appellant's first argument (Br. 9) is that handwriting specimens given Sergeant Hayden and identifications by the complainants the next day took place during a period of unnecessary delay and therefore should be excluded under *Mallory* v. *United States*, 354 U.S. 449 (1957); FED. R. CRIM. P. 5 (a).

Two things are immediately clear from appellant's own summation of the record: As to the handwriting specimens there was no unnecessary delay; as to identification evidence, no objection was made below. Appellant arrived at headquarters in Washington from New Jersey with Sergeant Hayden between six and seven P.M. (R. 58; see note 3). According to appellant, the "samples were apparently written about 7:40 P.M. (R. 60, 62) and took about 20–25 minutes to accomplish (R. 62)" (Appellant's Br. 2). The sergeant testified that appellant denied his guilt, claiming to have been elsewhere, and gave the samples voluntarily, without duress or promises, after having been warned that they were to be submitted to a handwriting expert (R. 62; see note 3).

Not only was there no delay after arrival, but no impropriety during the journey here is suggested. More important is the fact that no interrogation (as to guilt) is claimed. The case, therefore, lies outside the principle of exclusion in *Mallory*, which leaves room for standard police administrative practices. See also *Trilling* v. *United States*, D.C. Cir. Nos. 13069, 13165, 13212, April 17, 1958; *Blackney* v. *United States*, D.C. Cir. No. 13744, May 1, 1958.

The taking of handwriting specimens is akin to taking fingerprints which may, in instances, eventually prove more persuasive of guilt than expert testimony as to handwriting. Yet where a person is lawfully arrested, as here, before his fingerprints are taken, his constitutional rights against self incrimination [5] and unlawful search and seizure are not involved in taking fingerprints which ultimately connect him with possession of objects indicating guilt. *United States* v. *Iacullo*, 226 F. 2d 788 (7th Cir. 1955), *cert. denied*, 350 U.S. 966 (1956).

In *People* v. *Harper* it was held that handwriting samples are physical facts not involving the federal constitutional privilege against self incrimination.[6] Cf. *Shelton* v. *United States*,

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[5] Appellant suggests (Br. 10) that self incrimination is involved here.

[6] "The major attack of the defendants is aimed at the admission in evidence of their handwriting exemplars. Their basic argument is that they gave these exemplars only because of the alleged promise of the police officers that they would not be prosecuted. Defendants rely upon the privilege against self-incrimination contained in the Constitution of California * * * and in the Fifth Amendment to the Constitution of the United States. Defendants, however, do not come within the protection of those constitutional guaranties since they only protect a person from any unwilling testimonial disclosures and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an exemplar of his handwriting. The protection extends only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. There was no 'testimonial compulsion' here. Defendants were not required to verify the authenticity of their handwriting on the exemplars. Defendants were not compelled to disclose that the writing on the betting markers was theirs. This was proved by a handwriting expert. There is here no reliance to be placed upon any statement made by either of the defendants. The evidence was their handwriting, a physical fact which was compared with the handwriting on the betting markers and found to be the same. The exemplars were therefore properly admitted in evidence." *People* v. *Harper*, 115 Cal. App. 2d 776, 252 P.2d 950, 952 (1953).

205 F. 2d 806 (5th Cir. 1953), *cert. dismissed,* 346 U.S. 892 (1953); *Reining* v. *United States,* 167 F.2d 362, 365 (5th Cir. 1948). The furnishing of handwriting specimens, which the court below found was here involuntary, is grouped by Wigmore with physical appearance, the sound of a voice, and such other matters as are traditionally considered without the sphere of self incrimination. 8 WIGMORE, EVIDENCE § 2265, p. 381 (3d ed. 1940). Thus for a stronger reason references to an identification by complainants the morning after appellant's arrival were not excludable.

In the latter connection it is again noted that testimony of the complaining witnesses was not objected to below, possibly for the apparent reason that appellant never admitted guilt. As detailed in the counterstatement appellant had spent much time with three of the complainants selecting articles of merchandise. The prompt return of the checks crystallized their memory. One of them, at least, had identified him from photographs shortly after the crime while appellant was a fugitive. In face of the fact of contemporaneous identification, a delayed identification at headquarters is but a remote fruit, assuming, for argument, the existence of a "poisonous tree." Cf. *Nardone* v. *United States,* 302 U.S. 379 (1938).

It is therefore concluded that evidence objected to below was admissible, and objections made for the first time on appeal are clearly without substance.

II. Records of mental diagnoses are inadmissible

Appellant's second contention (Br. 13, 16) is that he hopes the Court will overrule *New York Life Ins. Co.* v. *Taylor,* 79 U.S. App. D.C. 66, 147 F.2d 297 (D.C. Cir. 1944) (inadmissibility of records of psychiatric opinion under the Federal Shop Book Act). This case was but recently sustained *en banc. Lyles* v. *United States,* D.C. Cir. No. 13467, Oct. 25, 1957. A panel is "without authority to overrule the decision of this Court sitting *en banc*". *District of Columbia* v. *Washington Post Co.,* 98 U.S. App. D.C. 304, 235 F.2d 531 (D.C. Cir. 1956).

In any event, as detailed in subsection (b) of the counterstatement, the jury was permitted to know from the records that appellant had been in mental institutions, the names and

dates being given. Further much case history material, relevant not only to his physical but also his mental condition, was admitted. This was supplemented by the expert testimony of Dr. Leopold, who had examined appellant a year after the crime and to whom materials had been submitted by the U.S. chief probation officer. It is therefore submitted that appellant's medical history was, in sum, adequately presented to the jury, the real question being not the existence of psychosis [7] but the extent of its productivity with relation to the appellant, whose career is marked by many periods of remission.

III. Claimed error in the Court's summarization was unassigned below and is without substance

In his final argument appellant quotes a portion of the charge in which, in the course of summarizing the evidence on both sides, the trial judge adverted to Dr. Leopold's testimony [8] that had appellant "been in a disturbed state at the time, he could not have planned and carried out the crimes charged in the indictment" (R. 204).

The appellant concedes that the doctor actually said this (Br. 16). The argument proceeds, however, that this "categoric statement" was qualified on re-direct, by the doctor's stating that a disturbed schizophrenic could "possibly", he "supposed", be entirely clever (Br. 17).

Appellant's conclusion that the particular summarization of the court was "out of context" is the more surprising in that appellant completely ignores the doctor's meticulous recital of the underlying basis for his view that appellant, considered in particular, could not have been in a disturbed state. As shown in the counterstatement, the doctor attended the whole trial on behalf of the defense. Appellant's activities over the months in question consisted of preparing the checks in a very artful manner, the procuring of false identifications, and the giving of plausible stories calculated to mislead. To this the doctor contrasted the apparent forgeries appellant attempted to utter

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[7] The court instructed there was impartial testimony that appellant had schizophrenia of many years standing (R.203).

[8] See subsection (b) of the Counterstatement, *supra*.

when in a disturbed state. In complete context, therefore, the statements on re-direct are seen for what they actually were, merely weak qualifications of the doctor's general statements not affecting substantially his conclusion as to this particular appellant.

If wide latitude in comment is permitted to a federal judge, the rule applies for a stronger reason where, as here, there is but a summary of the facts with the most emphatic admonition to the jury as to their independence in the matter (*e. g.*, R. 204). That the whole point is a mere afterthought on appeal looms large where, as here, the psychiatric testimony as a whole impels the conclusion that no substantial right is involved.

> No attention was called to the matter as it should have been if any misunderstanding was feared. The charge on the point was adequate and fair. It is objected that the judge called the jury's attention to Graham's testimony * * * The judge had a right to do more than that if he left the decision to them. In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth.

Graham v. *United States*, 231 U.S. 474, 480 (1913).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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